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Nos.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

APPENDICES TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2403

CBS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC., NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Intervenors

No. 79-2406

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

NATIONAL ASSOCIATION OF BROADCASTERS, CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.,
Intervenors

No. 79-2407

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Intervenors

Petitions for Review of Orders of the
Federal Communications Commission

Argued January 10, 1980

Decided March 14, 1980 [Judgment Entered This Date]

Timothy B. Dyk, with whom *J. Roger Wollenberg*, *Thomas W. White* and *Joseph DeFranco* were on the brief, for petitioner in No. 79-2403.

Thomas N. Frohock, with whom *James A. McKenna, Jr.* and *Carl R. Ramey* were on the brief, for petitioner in No. 79-2406.

Floyd Abrams, with whom *Dean Ringel*, *George Freeman* and *Howard Monderer* were on the brief, for petitioner in No. 79-2407.

Robert R. Bruce, General Counsel, Federal Communications Commission, with whom *David J. Saylor*, Deputy

General Counsel, *Terry Michael Banks*, Associate General Counsel, *C. Grey Pash, Jr.*, Counsel, Federal Communications Commission, and *John J. Powers, III*, Attorney, Department of Justice, were on the brief, for respondents.

John D. Lane, with whom *Ramsey L. Woodworth*, *Howard K. McCombs* and *Anthony F. Essaye* were on the brief, for intervenor, Carter/Mondale Presidential Committee.

Erwin G. Krasnow was on the brief for intervenor, National Association of Broadcasters.

Heidi P. Sanchez was on the brief for Amici Curiae, National Citizens Committee for Broadcasting, et al., urging affirmance.

Bruce E. Fein, Attorney, Department of Justice, also entered an appearance for respondent, United States of America.

Jerry W. Markham also entered an appearance for intervenor, Carter/Mondale Presidential Committee.

Before: BAZELON, *Senior Circuit Judge*; TAMM, *Circuit Judge*; and MARKEY,* *Judge*, United States Court of Customs and Patent Appeals.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Concurring opinion filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge*: In these consolidated appeals, the three major television networks seek review of orders by the Federal Communications Commission (FCC) finding that they had failed to fulfill their obligation under Section 312(a)(7) of the Communications Act [1] to permit "purchase of reasonable amounts of time

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] 47 U.S.C. § 312(a)(7) (1976). Section 312(a)(7) was added to the Communications Act of 1934 as part of the Fed-

for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." [2]

In October, 1979, the Carter-Mondale Presidential Committee (CMPC) asked that the three networks make available to it a half-hour of television time in early December, 1979. The networks declined to do so. CMPC filed a complaint with the FCC charging a violation of Section 312(a)(7). The Commission concluded that the response of each of the networks to the Committee's request to purchase time was unreasonable because the networks had failed to apply the proper legal standard in denying the request.[3] It ordered the networks to comply with the requirements of the Act. The networks appealed. We affirm.

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eral Election Campaign Act of 1971. Title I of that 1971 bill, which contained Section 312(a)(7), was known as the Campaign Communications Reform Act and was the broadcast reform section of the law.

[2] 42 U.S.C. § 312(a)(7) (1976). The relevant parts of Section 312 read in full:

> (a) The Commission may revoke any station license or construction permit . . .
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[3] Carter-Mondale Presidential Committee, Inc., —— FCC 2d —— (FCC 79-750, Nov. 21, 1979) (herein Order I), *reconsideration denied*, —— FCC 2d —— (FCC 79-773, Nov. 28, 1979) (herein Order II). Order I is found in the Appendix (App.) at 114; Order II is at 305.

I. THE SITUATION

On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, wrote each of the three major television networks, asking that they make available a 30-minute program slot between 8:00 PM and 10:30 PM on either December 4, 5, 6 or 7.[4]

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[4] The text of Mr. Rafshoon's letter to the three networks was identical:

> On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on ABC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for the Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.
>
> As you know, the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.
>
> Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16-18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 22 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above time seems eminently appropriate in view

CMPC intended to present a documentary outlining President Jimmy Carter's record and that of his administration. The program was to be presented just after the President's formal announcement of his candidacy, and it was designed to set the tone for the President's campaign.

The networks declined to make the requested time available—saying in essence that it was too much time, too soon in the race. CBS offered to make two 5-minute segments available; one in prime time (10:55 PM) on December 8, and one in the daytime class.[5] ABC told

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of the escalating political climate already generated by both print and broadcast media.

I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

App. at 11-12.

[5] The letter to Mr. Rafshoon from Raymond E. Dillon, Director of Political Sales at CBS, was dated October 17, 1979, and read:

Dear Mr. Rafshoon:

This is in response to your request that the CBS Television Network make available for purchase by the Carter/Mondale Presidential Committee, Inc., a half-hour program in prime time to be broadcast between 8:00 and 10:30 PM EST on December 4, 5, 6 or 7, 1979.

Because of the large number of present potential candidates for the Republican and Democratic presidential nominations, we are at this time unable to accede to your request to purchase a half-hour program. We note that three Democrats and eleven Republicans have already announced, or may reasonably be expected shortly to announce, their presidential candidacies; indeed two candidates for the Republican presidential nomination have already requested to purchase half-hour programs

CMPC that it had not yet reached a decision as to when it would commence the sale of political time for the 1980

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on the CBS Television Network, and their requests have been declined on the same basis as indicated below.

In light of the above circumstances, were we to provide the half-hour program you seek, accommodating potential requests for equal treatment from other candidates for presidential nomination would involve massive disruptions of the regular entertainment and information schedule of the CBS Television Network. Accordingly, we must respectfully reject your request.

We are, however, prepared to make one 5-minute segment in prime time and one 5-minute daytime segment available for purchase by your committee. We note that this is the same offer made to the Republican candidates referred to above in response to their requests to purchase half-hour time periods.

While we are unable to make available time on the dates you have specified, we are able to offer for your purchase a 5-minute period on December 8 between approximately 10:55 and 11:00 PM. We will also provide a specific 5-minute daytime availability for your purchase on request.

Since it is CBS' policy to sell time only to announced candidates for public office, this offer is, of course, conditional upon President Carter's having announced, or using the time purchased to announce, his presidential candidacy.

If you are interested in purchasing such a program or programs, please notify us promptly since substantial lead time of approximately four to five weeks is necessary for the editing required to accommodate program segments of this length.

Very truly yours,

App. at 19-20.

Presidential campaign, but that it would do so shortly.[6] It subsequently indicated that it would begin such coverage in January, 1980.[7] NBC simply indicated that it was not prepared to sell time for political programs in December, a month "too early in the political season for nationwide broadcast time to be made available for paid political purposes." [8]

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[6] The letter to Mr. Rafshoon from Charles C. Allen, Vice President for Sales Administration at ABC, was dated October 23, 1979, and read:

> Dear Mr. Rafshoon:
>
> This is to confirm my oral response given on October 16th to your letter of October 11, 1979 to Mr. Elton H. Rule, President of American Broadcasting Companies, Inc., requesting air time for the Carter/Mondale Presidential Committee, Inc. on December 4, 5, 6 or 7, 1979.
>
> As we discussed, the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential campaign, and, accordingly, we are not in a position to comply with your request. As I mentioned on the telephone, I believe that later this year a decision will be made to make political time for the Presidential campaign available on ABC-TV early next year.
>
> It was a pleasure speaking with you last week.
>
> Sincerely yours,

App. at 17.

[7] Letter of Counsel for American Broadcasting, Inc., to the Chief of the Complaints and Compliance Division of the Federal Communications Commission, November 5, 1979. App. at 29.

[8] The letter to Mr. Rafshoon from Joseph J. Iaricci, Vice President for Sales and Administration at NBC, was dated October 23, 1979, and read:

On October 29, 1979, CMPC filed with the FCC a complaint charging that the networks had violated their obligation to provide "reasonable access" pursuant to Section 312(a)(7). At an open meeting on November 20, 1979, the Commission found by a four-to-three vote that the networks had violated Section 312(a)(7). It issued a detailed Memorandum Opinion and Order (Order I) the next day [9] directing the networks to indicate by No-

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Dear Mr. Rafshoon:

This is in response to your letter of October 11, 1979 to Mr. Fred Silverman, on behalf of the Carter/Mondale Presidential Committee, Inc., requesting 30-minute availabilities on NBC between 8:00 and 10:30 PM, EST, on December 4, 5, 6 or 7, 1979.

We have evaluated your request carefully. Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes. In addition, we believe that honoring your request at this early stage of the Presidental campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time is, of course, a significant factor in our decision.

Insofar as the nomination process is now focused on political activities in individual states like Iowa, you may wish to contact stations serving those particular states.

Please be assured that NBC News will continue to cover important and newsworthy aspects of President Carter's political activities.

Very truly yours,

App. at 19.

[9] Carter-Mondale Presidential Committee, Inc., —— FCC2d —— (FCC 79-750, Nov. 21, 1979). App. at 114.

In dissent, Commissioner Lee argued that the Commission's decision prevented the networks from exercising "their

vember 26, 1979, how they intended to fulfill their obligation under the Act.[10]

The networks all sought reconsideration of the Commission's decision. Their reconsideration petitions were denied, however, and on November 28, 1979, the Commission issued a second Memorandum Opinion and Order (Order II)[11] clarifying its decision of the previous week. Order II set November 29, 1979 as the deadline by which the networks were required to file their plans for compliance with the statute.

On November 28, 1979, the networks petitioned this court for review of the FCC orders.[12] They also requested

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legitimate editorial judgment by rejecting the access request because of its prematurity." App. at 140. He concluded that, therefore, the decision was "a serious abuse of the Commission's discretion." *Id.* He later stated that he thought the majority's approach created "the appearance of government control over programming." *Id.* at 338.

Commissioner Washburn wrote in dissent that the majority opinion would stand for the proposition "that the candidate's own determination of his needs is overriding." App. at 142. The opinion represented "the FCC's interfering with the discretion of the broadcasters and substituting our judgment for theirs." *Id.* This, he later said, "destroy[ed] the delicate balance between assuring broadcasters' independence of journalistic discretion, affording increased opportunities for political discussion by candidates, and informing the electorate." *Id.* at 339.

[10] —— FCC 2d at ——; App. at 136.

[11] Carter-Mondale Presidential Committee, Inc., —— FCC 2d —— (FCC 79-773, Nov. 28, 1979). App. at 305.

[12] The National Association of Broadcasters intervened in support of the networks. One *amicus* brief was submitted by the Carter-Mondale Presidential Committee, Inc. in sup-

the court to stay the FCC orders pending such review, a request which we granted.

For reasons external to the campaign (primarily the perceived need to focus national attention on the plight of the American hostages in Iran), the Carter-Mondale Committee determined to postpone to early January the program it had planned to broadcast during the period December 4 to 7. It was still felt, however, that some time was needed in conjunction with the President's announcement of his candidacy. Accordingly, CMPC sought and subsequently obtained from CBS the purchase of five minutes of time on December 4. It also sought and obtained from ABC and NBC offers of time for a 30-minute program in early January, and the ABC offer was accepted. Throughout these negotiations CMPC, as well as the networks, reserved all rights relating to this appeal.

II. The Existence of an Affirmative Right of Access for Candidates Seeking Federal Elective Office

In the early days of this nation, political campaigns—even presidential campaigns—were relatively simple affairs. Campaigning took the form of speeches "from stump and pulpit, of debate in the highly partisan press, of private correspondence, and of persuasive activities on election day." [13] Near the close of the nineteenth cen-

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port of the FCC. Another *amicus* brief was submitted jointly by the National Citizens Committee for Broadcasting, the National Black Media Coalition, Americans for Democratic Action, the United Food & Commercial Workers International Union, Stewart Rawlings Mott, The Anderson for President Committee, James L. Buckley, the National Education Association, Rep. Albert Gore, Jr., Rep. Bill Frenzel, and Jerome Barron in support of the FCC.

[13] A. Heard, The Costs Of Democracy 401-06 (1960).

tury, however, as printing presses became more common and the price of paper decreased, the "era of campaign literature" began.[14] Radio was first used in the 1924 campaign: Calvin Coolidge spent $120,000 for radio time; his opponent, John W. Davis, spent $40,000.[15] By 1928, it was the most important campaign medium.[16] Television was a factor in the 1948 election: Republican rivals Harold E. Stassen and Thomas E. Dewey conducted a television debate before the Oregon primary. By the 1952 campaign, presidential candidates were spending millions of dollars on television.[17] Today, there can be no doubt that we are in the "era of television campaigning." [18] Indeed, since 95 percent of our people operate a television set for an average of over five hours a day,[19] and 60 percent of them rely primarily on television for news,[20] it would be hard to overestimate the importance of television to our political processes. It is undisputed that "[f]or presidential and senatorial candidates, the television is a necessity." [21]

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[14] Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 582 (1973).

[15] R. MacNeil, The People Machine 127 (1968).

[16] *Id.*

[17] *Id.* at 127-28.

[18] Wick, *The Federal Election Company Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 582 (1973).

[19] Twentieth Century Fund, Voters' Time, Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era 6 (1969).

[20] S. Michelson, The Election Mirror 25 (1972).

[21] Wick, *The Federal Election Company Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 583 (1973).

Against this backdrop, Congress passed the Federal Election Campaign Act of 1971, including as one of its four Titles the Campaign Communications Reform Act (Title I). Title I contained three significant provisions: (1) the FCC was empowered to revoke a station's license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy;" [22] (2) during a specified period before a primary or general election, a broadcast station was not permitted to charge a legally qualified candidate for any public office a fee in excess of its "lowest unit charge. . . for the same class and amount of time for the same period;" [23] and, (3) in using the communications media, candidates for federal elective office were not permitted to exceed established spending limits.[24] The first of these provisions was codified as Section 312(a)(7) and is the basis of this litigation.

The networks argue that Section 312(a)(7) did not create a new right of access for federal candidates. They contend that the statute merely codified FCC policies developed prior to 1971 under the public interest standard. They cite as support for this proposition *dictum* from the Supreme Court decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*:

> In 1959, as noted earlier, Congress amended § 315(a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license

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[22] 47 U.S.C. § 312(a)(7) (1976).

[23] 47 U.S.C. § 315(b)(1) (1976).

[24] 47 U.S.C. § 801(1), *repealed* Pub. L. 93-443, title II, § 205(b), Oct. 15, 1974, 88 Stat. 1278 (1976).

> "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates.[25]

On the other hand, the Commission and *amici* argue that the plain meaning of the statutory language and the statute's legislative history indicate that Congress *did* create in Section 312(a)(7) a new right of access for federal candidates.

The question is whether Section 312(a)(7) creates a right in candidates for federal elective office to advocate their candidacies by direct broadcast communication to the electorate. Such a right is properly called an *affirmative* right of access. It exists regardless of the actions of the actions of the broadcaster. By contrast, a *contingent* right of access must be activated by some prior event.[26] Access achieved under the equal time provision of Section 315,[27] for example, is a contingent right of access. Our study of the plain language of Section 312(a)(7) and our review of the legislative history of the provision leads us to conclude that Section 312(a)(7) *did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office.

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[25] 412 U.S. 94, 113 n.12 (1972).

[26] B. SCHMIDT, JR., FREEDOM OF THE PRESS V. PUBLIC ACCESS 17 (1976).

[27] 47 U.S.C. § 315 (1976).

A. *The Plain Language of Section 312(a)(7)*

The plain language of Section 312(a)(7) authorizes the FCC to revoke a broadcaster's license

> for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by *a legally qualified candidate* for Federal elective office on behalf of *his* candidacy.[28]

The provision speaks in terms of individual candidates—"*a* legally qualified candidate" seeking time to advocate "*his* candidacy." By contrast, the Commission's policy before Section 312(a)(7) gave no attention to individual candidates. The Commission summarized its practice prior to the adoption of Section 312(a)(7) in its *Report and Order, Commission Policy in Enforcing Section 312(a)(7)*:

> Prior to the enactment of [Section 312(a)(7)], we recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community. No legally qualified candidate had, at that time, a specific right of access to a broadcasting station. However, stations were required to make reasonable, good faith judgments about the importance and interest of particular races. Based upon those judgments, licensees were to determine how much time should be made available for candidates in each race on either a paid or an unpaid basis. There was no requirement that such time be made available for specific "uses" of a broadcasting station to which Section 315 "equal opportunities" would be applicable.[29]

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[28] 47 U.S.C. § 312(a)(7) (1976) (emphasis added).

[29] Report and Order, Commission Policy in Enforcing Section 312(a)(7), 68 FCC 2d 1079 (1978).

The change of focus manifested in the language of Section 312(a)(7), especially when seen against this backdrop of previous Commission policy, indicates that Congress was doing something different in that provision and supports the view that the legislators were creating a new right for invidual candidates when they passed that provision.[30]

Additionally, it is noteworthy that Section 312(a)(7) establishes an access right for candidates for *federal* office. The public interest doctrine, to the extent it establishes a right of access at all, does so for *all* offices —federal, state, and local. If Section 312(a)(7) does no more than codify the requirements of the public interest doctrine, it is peculiar that its plain language limits it to *federal* elections.[31] This is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine.

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[30] In their briefs and at oral argument, the networks make much of the fact that Section 312(a)(7) was enacted in the context of "a long tradition of *not* affording rights of access in the first instance to *individual* speakers." CBS Brief at 20 (emphasis added). This observation underscores the importance of the fact that the language of Section 312(a)(7) focuses on the individual candidate. The plain language of Section 312(a)(7) clearly goes beyond FCC practice under the public interest doctrine.

[31] Nowhere in their briefs do the networks explain why Congress would have referred only to federal candidates if it were intent on codifying Commission practice with regard to all candidates. When asked at oral argument to explain why Congress would have limited Section 312(a)(7) to federal candidates if it were not creating a right of access that went beyond that available under the public interest doctrine, counsel for CBS had no explanation.

B. *The Legislative History of Section 312(a)(7)*

The legislative history of Section 312(a)(7) and of the statute in which it was passed provides support for the view that Section 312(a)(7) created an affirmative right of access for federal candidates. Section 312(a)(7) was enacted as part of Title I of the Federal Election Campaign Act of 1971. One of the primary purposes of Title I was "to give candidates for public office *greater access* to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." [32]

The supporters of the provision in the Senate saw it as a means of creating a new right of access. Senator Pastore, opening the hearings before the Senate Subcommittee on Communication concerning the Act, noted that increased access could be accomplished either by repeal

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[32] S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 1773, 1774 (emphasis added). *See also* S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1821; 117 Cong. Rec. 28792 (1971) (statement of Sen. Pastore).

The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to "emphasize" the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during preelection periods. S. Rep. No. 96, *supra*, at 34, *reprinted in* U.S. Code Cong. & Ad. News at 1781-82. However, it must be said that there is no specific explanation of the statutory language or statement of its intended impact in the Senate report.

of Section 315 or by mandating a scheme of access.[33] Senators Scott and Mathias, the co-sponsors of Section 312(a)(7), proposed the section as a means of granting access—especially to the nonincumbent candidate who needs it most.[34]

An amendment to the second sentence of Section 315 (a) which was adopted at the same time as Section 312(a)(7) lends further support to our reading of Congressional intent. Prior to 1971, the second sentence of Section 315 made clear that broadcasters were not common carriers as to an initial request by a political candidate but only as to responsive requests under the equal opportunities provision of the Section. When the Congress adopted Section 312(a)(7) in 1971, it amended the second sentence of Section 315(a) to read: "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." The conference reports state that the addition of the language "under this subsection" was a "conforming amendment" necessitated by the adoption of Section 312 (a)(7).[35] If Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no "conforming amendment" to Section 315 would have been required.

While not dispositive, subsequent events also lend credence to our reading of the statute. In 1973, the Senate reviewed the results of the 1972 campaign in light of the Federal Election Reform Act of 1971. The Committee also had under consideration new bills proposing the re-

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[33] Federal Election Campaign Act: Hearings on S.1, S.382, S.596, Before Subcomm. on Communications of Senate Comm. on Commerce, 92d Cong., 1st Sess. 152 (1971).

[34] *Id.* at 348.

[35] H. Conf. Rep. No. 92-752, 92d Cong., 1st Sess. 22 (1971); S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22 (1971).

peal of Section 315. Then FCC Chairman Dean Burch testified concerning, among other things, the Commission's experience with Section 312(a)(7).[36] He informed the Committee that the Commission had issued a statement setting forth its understanding that "Section 312 (a)(7) now imposes on the overall obligation to operate in the public interest the *additional specific requirement* that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office."[37] After explaining how the Commission was interpreting the statute, Chairman Burch stated: "[i]f we have erred in some important construction, we would, of course, welcome Congressional guidance."[38] Senator Pastore, the floor manager for the 1971 Act, responded that the Commission was going about the task well.[39] Two days later in these hearings, Dr. Frank Stanton, Vice Chairman of CBS, made a strong plea to the Committee for the repeal of Section 312(a)(7). Dr. Stanton stated:

> Section 312(a) now requires that on the pain of license revocation a broadcaster must make available to candidates for a federal elective office reasonable amounts of paid time or reasonable access to free time.[40]

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[36] Hearings Before the Communications Subcommittee of the Senate Committee on Commerce, 93rd Cong., 1st Sess., ser. 93-4 at 139 (1973).

[37] Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C. 2d 510, 537-38 (1972) (emphasis supplied).

[38] Hearings Before the Communications Subcommittee of the Senate Committee on Commerce, 93rd Cong., 1st Sess., ser. 93-4 at 137 (1973).

[39] *Id.*

[40] *Id.* at 190.

Dr. Stanton went even further by stating:

> Section 312 *grants rights to all legally qualified candidates for Federal office* and as the phrase "legally qualified" has been interpreted by the FCC it includes many a fringe candidate.[41]

Our study of the legislative history of Section 312(a)(7) causes us to agree that it requires a broadcaster to "make available to candidates for a federal elective office reasonable amounts of paid time."[42] To put it another way, our reading of the legislative history leads us to conclude that Section 312(a)(7) creates the right of affirmative access that the networks are contesting in these cases.

C. *The Relevance of CBS* v. *DNC*

The strongest support for the networks' contention that Section 312(a)(7) did *not* create a *new* right of access is *dictum* in the Supreme Court's opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee.*[43] In light of the plain language and statutory history of Section 312(a)(7), we find that *CBS* v. *DNC* is not controlling here. In *CBS* v. *DNC*, the Court was considering a decision by the FCC that neither the Communications Act nor the First Amendment *required* the agency to *force* broadcasters to accept paid editorial advertisements from citizens at large. The Court held that the agency was not *required* to establish such an affirmative right of access for all citizens. While treating this issue in a lengthy opinion, the Court, in a passage that was deferential to both Congress and the FCC, noted that the Commission had frequently ruled that no *private* in-

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[41] *Id.*

[42] *Id.*

[43] 412 U.S. 94 (1972).

dividual had a right of access, and that Congress had not reversed that policy.[44] Then it noted that Congress had not adopted a *general* right of access in spite of the fact that it had amended the Communications Act several times. It was in a footnote to this point that the Court alluded to Section 312(a)(7) as one of several amendments to the Act which had been adopted. The Court said in cursory fashion that Section 312(a)(7) "essentially" codified the prior standards of the Commission.[45] This *dictum* strayed far from what was before the Court, and it was uttered in a case quite different from those before us.

The Supreme Court in *CBS* v. *DNC* held that the First Amendment does not require that citizens at large be granted access to broadcasting facilities upon request. The "essentially codified" language indicates at most the Court's judgment that Section 312(a)(7) represents no departure from *one* principle embodied in the public interest standard—to wit, that one limited class of speakers, political candidates, has a stronger claim to the airwaves than do citizens at large. The Court's *dictum* is not a denial that Congress had enacted, in 1971, a very specific, obligatory right of access for federal candidates. In disallowing a potentially expansive system of access, the Court simply had no need to pass on whether Congress had adopted the much more limited affirmative right of access embodied in Section 312(a)(7).

It is noteworthy that, in the case before us, the deference to Congress and the Commission which the Court manifested in *CBS* v. *DNC*[46] cuts in favor of the existence of a limited right of access. Here, the Commis-

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[44] *Id.* at 112-13.

[45] *Id.* at 113-14 n.12.

[46] CBS v. DNC, 412 U.S. at 112-13; *see also id.* at 131.

sion uses a statutory provision to *support*, rather than resist, the imposition of a limited affirmative right of access.

D. *Summary of Section II*

At oral argument, counsel for ABC was asked whether he would accept the proposition that Section 312(a)(7) created *some* right of access on the part of federal candidates at *some* point in the campaign. He said that he would. On further questioning from the bench, he admitted that therefore the issue of candidate access before us could be reduced to two questions: (1) when does the right of access attach, and (2) how might we decide whether the treatment accorded a given request for access is reasonable.

We agree. Our study of the language and history of Section 312(a)(7) leads us to conclude that it did create an affirmative right of access for individual candidates for federal elective office. It is the implementation of that right of access by the FCC which must now be examined.

III. The Implementation by the FCC of the Affirmative Right of Access for Candidates Seeking Federal Elective Office

The networks challenge the implementation of Section 312(a)(7) by the Commission, arguing that the orders involved here are arbitrary, capricious, and contrary both to the statute and to prior FCC interpretations of the statute. They contend that in these cases the Commission improperly substituted its judgment for that of the broadcasters in deciding what access was reasonable.

The Commission responds that the orders are based upon reasonable standards, previously articulated. It contends that in these cases it assumed only a narrow overseer's role—that it focused primarily on whether the broadcasters had given full consideration to all the rele-

vant factors. It repudiates any attempt to substitute its judgment for that of the broadcasters. Rather, it claims that it confined itself to judging the objective reasonableness of the broadcasters' actions based upon their own explanations of the bases of their decisions.

The Commission's authority to interpret Section 312 (a) (7) is not in dispute. That authority derives from Section 303(r) of the Communications Act which provides that the Commission shall "make such rules and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act. . ." [47] It is the propriety of the Commission's implementation of the statute in these specific cases that is challenged by the networks.

In the eight years since Section 312(a) (7) became law, the Commission has developed its interpretation of the statute, usually on a case by case basis. Only occasionally has it issued general interpretative statements.[48]

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[47] 47 U.S.C. § 303(r) (1976).

[48] In 1978 the Commission issued a Notice of Inquiry which asked, *inter alia*, whether it should commence rulemaking proceedings in order to clarify licensee obligations under § 312(a) (7). 43 Fed. Reg. 12938 (March 28, 1978). Had it done so, many of the questions raised today may have been resolved. We understand its decision not to do so, however, in light of th strong opposition by petitioners and others to such proceedings. Petitioner CBS, in fact, went so far as to challege the legality of FCC rulemaking on the grounds that it would "constitute an unwarranted governmental intrusion upon content and scheduling judgments of broadcasters." Report and Order: Commission Policy in Enforcing Section 312(a) (7) of the Communications Act, 68 FCC 2d 1079, 1080 (1978). In responding to meritorious Commission initiative by raising such concerns, petitioners have, at the very least, not eased the FCC's burden in interpreting and implementing § 312(a) (7).

The 1978 *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*[49] is by far its most thorough statement to date. While this generally *ad hoc* approach is not ideal, we cannot say that during the process the Commission has been "indifferent to the rule of law,"[50] as the petitioners contend. Varying applications of Section 312(a)(7) have occurred, but only where varying factual contexts have required it. New developments in the agency's interpretation of the statute have surfaced, but never without good cause, adequately explained. We are satisfied that the Commission's orders in this case are within the agency's statutory authority and do not represent an abuse of discretion.

A. *Determining When the Campaign Has Begun*

The networks claim a right to refuse to sell time to candidates "too early" in the campaign. In the instant case, they contend that the Carter-Mondale Presidential Committee was requesting too much time, too soon in the race. They argue that the national political conventions and the general election were too far away to justify the airtime sought by CMPC.

The Commission counters that the question of when the obligations imposed by Section 312(a)(7) attach is a threshold question which has "an inherently . . . objective character."[51] It argues that neither broadcasters nor candidates "bring a perspective of total objectivity as to questions of the initial applicability of Section 312(a)

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[49] 68 FCC 2d 1079 (1978).

[50] Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (1971).

[51] Carter-Mondale Presidential Committee, Inc., —— FCC 2d ——, —— (FCC #79-773, November 28, 1979) (*Order* II). App. at 315.

(7)." [52] It concludes, therefore, that it is the FCC's statutory obligation "to make a determination on this threshold issue . . . based on [an] independent evaluation of the status of the campaign, taking into account the position of the candidate and the networks as well as other factors." [53]

In this case, the agency looked to a variety of "objective indicia" in determining that the campaign had begun. Among the factors considered were: announcements of candidacy, the establishment of national campaign organizations, fund raising activities, endorsements, media coverage, and the progress of the delegate selection process.[54] "In this context," the Commission stated, "the only reasonable conclusion to be drawn is that the campaign is in full swing now." [55]

It is noteworthy that the networks do not challenge the reasonableness of the indicia used by the FCC in reaching its conclusion. Nor do they challenge the reasonableness of the conclusion itself. They argue only that the agency ought not address the question at all.

The networks argue that the FCC's decision to treat "the question of when" as one to be answered by the Commission "cannot be reconciled with" its prior statements on the issue.[56] It is true that, prior to the orders now under review, the Commission's pronouncements on this point have lacked the clarity that facilitates review. Still,

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[52] *Id.*

[53] —— FCC 2d at ——. App. at 314.

[54] Carter-Mondale Presidential Committee, Inc., —— FCC 2d ——, —— (FCC #79-750, November 21, 1979) (*Order* I). App. at 129-31.

[55] —— FCC 2d at ——. App. at 131.

[56] CBS Brief at 29.

we are unable to conclude that the present orders "cannot be reconciled with" these earlier renditions of the Commission's position. The 1978 *Report and Order*, the only statement by the Commission which addressed the issue in a meaningful way, seems to have assumed that the "question of when" was addressed to the FCC. Therein, the Commission declined to place any uniform limits on the period during which Section 312(a)(7) applied "because each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates." [57] Determining to proceed on a case-by-case basis, the Commission specifically foresaw the possibility that "a presidential campaign may be in full swing almost a year before an election. . . ." [58] The key fact is that the Commission *declined* to define uniform limits. It did not foreswear the power to do so; indeed, it affirmed the power to decide on a case by case basis when campaigns had begun.[59]

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[57] Report and Order: Commission Policy on Enforcing Section 312(a)(7), 68 F.C.C. 2d 1079, 1091 (1978).

[58] *Id.*

[59] Although the networks cite *dictum* in one decision of the Commission, Anthony R. Martin-Trigona, 66 F.C.C. 2d 968, 969 (1977) (holding that Martin-Trigona was not a "legally qualified candidate"), to support their position, they have failed to direct us to a single case where either the Commission or the Broadcast Bureau *directly considered* the question at hand and decided it in a way which "cannot be reconciled with" the FCC's position in this case. Indeed, in the second Anthony R. Martin-Trigona case, 67 F.C.C. 2d 743 (1978), the Commission said that, in addressing this question, "the licensee, and *ultimately the Commission* must look to the circumstances of each particular case to determine when it

ABC argues that if the FCC undertakes the task of deciding when a campaign has begun in order to enforce Section 312(a)(7), the agency will be impermissibly involved in the election process. This would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it has *already begun.* As described in the orders under review, the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process.[60] There is nothing offensive about such a system.[61]

Finally, all three networks argue that permitting the FCC to decide the "question of when" would violate their First Amendment rights. Though we reserve discussion of most of the constitutional arguments raised by the net-

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is reasonable for a candidate's access to begin. . . ." 67 F.C.C. 2d at 746 n.4.

We cannot find that the Commission was "indifferent to the rule of law" and its past precedents in deciding independently to determine the date upon which access rights accrue to federal candidates. Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C.Cir. 1971).

[60] As Commissioner Brown noted in his separate statement on reconsideration: "The Commission did not create this factual situation, but neither we nor the networks can ignore it." *Order* II. —— FCC 2d ——, —— (1979). App. at 330.

[61] ABC insists that a result of the Commission's ruling is that the candidate's needs or desires will govern when the broadcaster must begin selling time in a campaign. *See, e.g.,* ABC Brief at 18, 26, 30, 36, 43-46, 50. But the Commission held that the "candidates needs" is one of the considerations to be weighed by the broadcaster *after* a threshold determination has been made that the campaign is under way and the obligations imposed by Section 312(a)(7) have attached. *See Order* II, —— FCC 2d ——, —— (1979). App. at 321-24. The "candidate's needs" play no role in determining whether Section 312(a)(7) obligations have attached.

works for a later section of this opinion,[62] we treat this one here. Simply put, not all aspects of the broadcasting business enjoy constitutional protection.[63] It is the editorial process that is protected—and, as the Supreme Court has explained, "editing is the selection and choice of material." [64] A determination of when statutory obligations attach is not an editorial decision. More specifically, deciding whether a campaign has begun for the purposes of Section 312(a)(7) involves no choice of material; it is purely a legal judgment. And, "a legal judgment by a licensee . . . cannot be legally binding on the FCC or this court . . ." [65] Therefore, there is no constitutional objection to a determination by the Commission defining the point during a campaign when the obligations of Section 312(a)(7) attach.

The networks ignore the fact that by raising "the question of when" the Commission has narrowed the scope of the statute and has limited its impact on broadcasters. On its face, the statute applies to "a legally qualified candidate for Federal elective office." It might be read as

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[62] *See* Section IV *infra*.

[63] The business and commercial aspects of journalism, for example, are not immunized from regulation by first amendment considerations. *See*, Citizen Publishing Co. v. U.S., 394 U.S. 143, 155-56 (1951) (no immunity from antitrust laws); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act held applicable to news-gathering organization). Nor may a news reporter refuse to testify before a grand jury, even as to information acquired through reporting activities. Branzburg v. Hayes, 408 U.S. 665 (1972).

[64] CBS v. DNC, 412 U.S. 94, 124 (1973).

[65] National Broadcasting Co. v. FCC, 516 F.2d 1101, 1173 (Bazelon, C.J., dissenting from the order vacating the previous order granting rehearing *en banc*).

vesting rights in the individual candidate at such time as he becomes legally qualified—without regard to the stage of the campaign. By confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters.[66]

In summary, the Commission was justified in pronouncing its right to decide when in the campaign the access rights granted to candidates by Section 312(a)(7) attach. This determination is an objective, non-editorial judgment for which the Commission is better suited than either broadcasters or candidates. The Commission was also justified in opting for a campaign-by-campaign approach to the question rather than for a uniform rule. The indicia adduced by the FCC for this campaign-by-campaign analysis are reasonable, and they were reasonably applied in this case. The Commission's actions in this regard comported with prior FCC rulings and are constitutionally acceptable.

B. *Determining Whether Reasonable Access Has Been Granted*

Once the threshold determination that a campaign has begun is made by the Commission, it remains for someone to decide whether reasonable access has been granted to specific requesting candidates. The networks argue that the Commission has created a system of inconsistent standards which vitiates broadcaster discretion by overvaluing the candidate's desires. The Commission responds that it has articulated reasonable standards which value both "broadcaster discretion and broadcaster ac-

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[66] *Cf.* American Security Council Education Foundation v. FCC, —— F.2d —— (No. 77-1443, D.C. Cir., June 29, 1979), *petition for cert. filed.*

countability,"[67] and it contends that these standards have been consistent over time.

Before we discuss the merits of these claims, we must consider one significant prefatory issue. From the language of Section 312(a)(7), it is not obvious whether, once the campaign has begun, the reasonableness of the access provided a candidate is to be measured from the perspective of the requestor or from that of the grantor (the broadcaster). The CMPC argues the case as if the standard were whether a reasonable *request* has been made.[68] It is clear that the networks perceive their obligation—insofar as they perceive that they have one at all—as an obligation to make a reasonable *offer*. To the extent it faces this problem directly, the Commission requires that the *offer* of access be reasonable—with due consideration of the particular needs of the candidate.[69] This position is consistent with the Commission's 1978 *Report and Order*.[70] As between the two possible readings of the statute, this latter view better reflects the legislative history.

We now turn to our discussion of the standards employed to determine whether reasonable access has been granted in specific cases.

(1) *The Type of Review Conducted by the Commission in Examining a Broadcaster's Decision.* All parties to this litigation pay lip-service to the concept of broadcaster discretion. The issue is: to what extent *is* deference paid to the editorial rights of the broadcasters by

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[67] *Order* II, —— FCC 2d ——, —— (1979). App. at 321.

[68] CMPC Brief at 32-34.

[69] Order I, —— FCC 2d ——, —— and n.16 (1979). App. at 126-27.

[70] Report and Order, Commission Policy on Enforcing Section 312(a)(7), 68 FCC 2d 1079 (1978).

the Commission's definition of "reasonable access?" The broadcasters say their discretion is effectively eliminated. The FCC says it preserves broadcaster discretion while seeking only broadcaster accountability. We find that the agency has succeeded in its delicate task by confining itself to a review of two questions: (1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards? Discretion remains with the broadcaster, but *not* discretion to act without reasonable regard to the standards.

The Commission describes the type of review it has employed for access cases as forcing the networks to take a "hard look," [71] and it cites *Greater Boston Television Corp.* v. *FCC* [72] and *Citizens to Preserve Overton Park, Inc.* v. *Volpe.*[73] Often the "hard look" metaphor is used to mask a content-less test, however. Here, we take the Commission to be saying that it will insist that broadcasters consider and address all non-frivolous matters in responding to a candidate's request for time. We approve this approach.

We hasten, however, to note the restraints upon the reviewing tribunal that are inherent in this type of review. As Justice Harlan observed in applying the concept to reviewing *courts*:

> The court's responsibility is not to supplant [a] Commission's balance of . . . competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned

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[71] *Order* I, —— FCC 2d ——, —— (1979). App. at 126.

[72] 444 F.2d 841, 851 (1971), *cert. denied*, 406 U.S. 950 (1972).

[73] 401 U.S. 402, 416 (1971).

> consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purpose for which, it has chosen to act. . . .[74]

The Commission was correct in concluding that it should confine its role to "judging the objective reasonableness of the licensee's determination"[75] and that it must avoid making its own subjective judgments or substituting its judgment for that of the broadcaster.

The Commission has required that broadcasters file, "in response to a complaint, a full explanation of a broadcaster's decision." A statement of reasons is indispensable to meaningful review. If the Commission is to limit its role in determining whether the broadcaster has considered and addressed all non-frivolous matters in processing an access request, such a requirement is not only proper but also necessary.

(2) *The Standards to Which a Broadcaster Should Advert in Deciding Whether to Grant a Specific Request for Access.* The networks claim that the standards applied by the Commission in these cases are vague, inconsistent with previous FCC statements concerning the relevant standards, and unduly considerate of the candidate's desires. The Commission contends that the standards it has proferred have been articulated clearly and consistently in recent years, and it avers that they strike the proper balance between the statutory goal of access

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[74] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). *See also* Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (1969).

[75] Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (1976).

for candidates and the needs of broadcast journalists. After reviewing the standards advanced by the FCC in these cases and in its earlier statements on this subject (especially the 1978 *Report and Order*),[76] we conclude that the Commission has articulated reasonable standards to guide broadcasters in determining whether to grant specific requests for access. In addition, though the Commission's thinking clearly has been evolving, we find no fundamental inconsistency between its earlier statements and its action in these cases.

In its 1978 *Report and Order*, the FCC declined to adopt formalized rules to implement Section 312(a)(7) because "there are no [such] rules which would encompass all the various circumstances possible during an election campaign."[77] However, it did note and discuss "areas . . . where some guidelines would be appropriate to clear up confusion expressed by candidates and licensees and to ensure that the Congressional intent in enacting Section 312(a) is fully realized."[78]

According to the FCC, some appropriate considerations are: (a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request.

In its 1978 statement, the Commission stressed that the *individual* needs of the candidate making the request for access deserved special weight. It indicated a belief

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[76] Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C. 2d 1079 (1978).

[77] *Id.* at 1089.

[78] *Id.*

> that Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access.[79]

It went further:

> A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee.[80]

The Commission noted that it would be particularly unreasonable for a broadcaster to

> follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers. We feel certain that Congress in granting Federal candidates a specific right of access to a station wished such candidates to be at least on par with commercial advertisers who have no such access rights. . . .[81]

Indeed, it flatly proscribed such across-the-board bans.[82]

In its first order in the cases at hand, the Commission noted that it placed "particular emphasis" on the candidate's needs. But it pointed out that

> [i]n taking this factor into account, the licensee . . . does retain some discretion to evaluate the reason-

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[79] *Id.* at 1089 n.14 (1978).

[80] *Id.* at 1090.

[81] *Id.*

[82] *Id.* at 1094.

> ableness of [the candidate's] assessment [of his needs] in the broad sense and to weigh that factor against other factors which we have said are relevant.[83]

In its second order, the agency explained even more fully "how the specific nature or purpose of a particular candidate's request should be weighed." [84] The Commission indicated that the broadcaster was not to evaluate the candidate's needs insofar as they involve the candidate's subjective, personal or immediate political desires. Nor should the broadcaster second-guess the political wisdom of the candidate's request.[85] Instead, in evaluating the candidate's needs, the broadcaster was to act in a manner that was responsive to the candidate's request.

> In this overall weighing process, we nevertheless believe that a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime. For example, a candidate might request an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests. In our view Section 312 (a) (7)'s goal of encouraging electorate-informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request.[86]

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[83] *Order* I, —— FCC 2d ——, —— (1979). App. at 126.

[84] *Order* II, —— FCC 2d ——, —— (1979).

[85] *Id.* at ——. App. at 315-21.

[86] *Id.* at ——, App. at 317.

Thus, consideration of the candidate's needs should manifest itself in "a specific—rather than blanket—response to individual requests [which affords] greater assurance . . . that [the] candidate's interests cannot be ignored in the balancing process." [87]

The individual need of the candidate is only the first consideration advanced by the Commission to guide broadcasters in determining whether to grant a specific request for access. A second consideration is the amount of time previously provided to the candidate. Clearly, as the amount of time *already provided* to a candidate increases, the strength of his request for additional time decreases. This consideration merely reflects the fact that inherent in the term "reasonable access" is the notion that the broadcaster may place some limits on the amount of time it will make available to any single candidate. It follows that whatever the broadcaster's obligation to provide access to a candidate, the obligation will be greater if the candidate has not previously been provided time.

In this respect, the networks have misinterpreted the Commission's statements regarding the weight to be accorded a candidate's first request. The networks argue that the FCC gives so much weight to the first request of a candidate that a first request cannot be denied. At oral argument, counsel for FCC protested that nothing in the Commission's decisions requires that first requests be granted automatically. He continued that the Commission merely noted that, as the *first* request, it could not be denied on the basis that the candidate had already obtained a reasonable amount of time to satisfy the statute.[88] We read the orders under review to say ex-

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[87] *Id.* at ——. App. at 322.

[88] *Id.* at ——. App. at 316. *See also* Separate Statement of Commissioner Brown, — —FCC 2d at ——. App. at 332.

actly that. The decisions allow the broadcaster leeway to demonstrate that the amount of time requested cannot be granted because of the likelihood of subsequent requests or that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that other candidates will request time.[89] Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible.

The third consideration advanced by the FCC to guide broadcasters in granting or denying access requests is the potential disruption of the broadcaster's regular programming. The simple fact that a broadcaster would have to make some changes in his program schedule is not a sufficient basis for denying a request unless those changes would amount to a "substantial" disruptive impact. Congress envisioned a system where federal candidates would have access—presumably by displacing some regular programming. Only substantial disruption of a broadcaster's regular programming is entitled to weight in the balancing process.

The danger of disruption is greatest, of course, in the closing days of a campaign when most, if not all, candidates will desire air time. The farther away one moves from election day, the more diluted the impact of mandatory political "uses." Thus, the Commission has indicated that the danger of disruption will be weighted more heavily *later* in the campaign.[90]

Section 312(a)(7) operates against the background of the equal time requirements of Section 315.[91] The fourth consideration that broadcasters may weigh in addressing a candidate's request for time is the number of other candidates likely to invoke equal opportunity rights if

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[89] *Id.* at ——. App. at 317.

[90] *Order* I, —— FCC 2d —— ,—— (1979). App. at 133.

[91] 47 U.S.C. § 315 (1976).

the broadcaster grants the request before him. At a given point, the potential disruption might justify denying or, more likely, limiting a request for time. More often, a likelihood of a large number of equal time requests might justify modification of requirements concomitant to the access right. For example, in its 1978 *Report and Order*, the FCC said:

> We are aware that there may be situations where the number of Federal candidates in a particular election may make it impossible for a station to make prime-time program-time available. We have never held that the "prime-time, program-time" policy is absolute and inflexible. We will continue to make exceptions to this policy where circumstances dictate.[92]

The fifth consideration offered by the FCC to guide broadcasters faced with requests for access is the timing of the request itself. This is separate from the question of when obligations under Section 312(a)(7) attach. Here the issue is whether the candidate has given the broadcaster reasonable notice that he desires to purchase time—notice sufficient to permit the broadcaster to make the adjustments in its schedule that may be required. If a request is made months in advance, denying it is more unreasonable than it would be if it is made only days before the proposed broadcast.

Finally, the Commission has articulated an overarching consideration to which broadcasters must attend in considering a candidate's request for time. The broadcaster must articulate with clarity the basis for his decision. He must address the five considerations just outlined when they are relevant, and he must treat any others that might bear on the individual case.[93]

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[92] Commission Policy in Enforcing Section 312(a)(7) of the Communications Act 68 F.C.C. 2d 1079, 1090 (1978).

[93] *See* Section IIIB(1) *supra*.

C. *Applying the Standards to the Cases at Hand*

We must now consider whether the record in these cases adequately supports the Commission's conclusion that the networks failed to apply the proper standards. We hold that it does.

NBC and ABC refused to sell the Carter-Mondale Presidential Committee *any* time in December, saying it was too early in the campaign. The networks have not contested the reasonableness of the Commission's finding that the campaign was in full swing. Instead, they argued that as a legal matter the Commission did not have the power to make that finding. However, we have affirmed the FCC's authority to make that decision.[94] It follows that the Commission was correct in finding that NBC and ABC had failed to apply the proper standards in responding to CMPC's request for time.[95]

The networks—in this regard, all three networks—displayed unreasonable disregard for the relevant standards in a second way, however. NBC and ABC, by deciding that it was too early to sell time to *any* candidate, had settled on what amounted to an across-the-board ban on candidate access. CBS, for its part, had in September adopted a policy of selling two five-minute spots to candidates who requested time in 1979.[96] While the CBS policy did not represent a total ban, it was also an across-the-board policy. Such across-the-board policies violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster had to tailor his response to the

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[94] *See* Section IIIA *supra.*

[95] *See Order* I, —— FCC 2d ——, —— (1979). App. at 134.

[96] *Id.* at ——. App. at 135.

individual candidate.[97] Across-the-board policies inherently fail to address this standard. Thus the Commission found that NBC's absolute refusal to sell any time was precisely "the type of 'arbitrary blanket ban' that was deemed to be unreasonable in our July 1978 *Report and Order*." [98] And, it concluded with respect to ABC's and CBS's sales policies:

> ABC appears to have adopted a *blanket policy* of refusing to sell time to presidential candidates until January 1980 which, in view of our determination about the state of the campaign is unreasonable.[99]

and,

> We cannot find that these reasons [advanced by CBS] are sufficient to justify a *blanket refusal* to

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[97] *See* Section IV B(2) *supra.*

[98] CBS states that "if the circumstances of the individual candidate were required to be considered . . . it would have been reasonable for CBS to make a limited offer of program time at this point, in light of the fact that President Carter enjoys unparalleled access to the media." CBS Brief at 38. ABC makes a similar argument, ABC Brief at 55, and NBC refers to the argument in a footnote, NBC Brief at 43. These arguments ignore the plain meaning of the statute and the Commission's interpretation of that language as articulated in Penny Manes, 42 FCC 2d 878 (1973). The statute makes clear that the obligation to afford "reasonable access" can be satisfied only through the sale or gift of "use[s]" of the station and that coverage of the candidate in news programming is not sufficient. Moreover, as early as 1973, the Commission stated that "Section 312(a)(7) relates to 'use' of a licensee's facilities by the candidate, not to a licensee's coverage of a candidate's campaign in news or public affairs programming." Penny Manes, 42 FCC 2d 878 at 882-83.

[99] *Order* II, —— FCC 2d ——, —— (1979). App. at 323 (emphasis supplied).

> sell the time; nor can we find that these reasons are sufficient to justify CBS' policy of limiting its sales to candidates to five minute segments.[100]

In particular, the across-the-board policies of all three networks failed to address the needs of CMPC as stated by it—to wit, for a 30-minute block of time to present a comprehensive statement that would "kick off" the campaign in the thought-to-be crucial days of early December. The FCC did not prejudge that 30 minutes was the only reasonably responsive offer the networks could make. But it was clear 0 minutes, or 5 minutes, would not do—especially when those offers were the result of an across-the-board policy. It correctly concluded that, given their proposals, the networks could not have taken the requisite "hard look" at the relevant factors—here, especially the first factor, the specific needs of the candidate. Therefore, the Commission correctly concluded that the networks had unreasonably failed to grant access as required by Section 312(a)(7).

D. *Conclusion to Section III*

In these cases, the Commission's view might be summarized as follows: the interests of broadcasters and candidates must be balanced in determining what consittutes reasonable access; the broadcaster must be responsive to each individual request by a candidate and may not adopt across-the-board policies; the broadcaster must provide a full explanation of the basis of his decision in responding to a request, giving full consideration to all relevant factors; and in the final analysis the Commission's role is to judge the objective reasonableness of the broadcaster's action based on the broadcaster's own explanation of the basis for his decision. In essence, the

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[100] *Order* I, —— FCC 2d ——, —— (1979). App. at 134-35 (emphasis supplied).

Commission determines, based upon the record adduced by the broadcaster, whether or not the broadcaster has considered and addressed all non-frivolous matters.

Stated as it is summarized in the preceding paragraph, the Commission's position is eminently reasonable. But the actions of the agency in these cases were not flawless. If an agency intends to demand that regulated companies consider and address all relevant factors, it must be clear and consistent in articulating those factors. Here, although the source for each of the standards pressed by the Commission can be seen with hindsight, the agency failed to headline its policy as clearly as it might have.

On the other hand, it must be said that during the course of these cases, the FCC gave the networks every opportunity to explain and justify their decisions. The Commission examined the networks' claims with care and deference, and it articulated the reasons and rationale for its actions with clarity. Moreover, the standards employed in the orders under review here represent a very reasonable effort at implementing Section 312(a)(7). The Commission's orders satisfy the requirements for reasoned decision-making set forth by this Circuit in *Greater Boston Television Corp.* v. *FCC*.[101]

IV. The Constitutionality of Section 312(a)(7) as Implemented

The networks argue that Section 312(a)(7) violates the First Amendment because it impinges upon their editorial discretion, injecting the government into the decisional processes of broadcasting.[102] They cite *Miami*

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[101] 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

[102] At the outset, a tension in the overall argument of the networks is worth noting. On the one hand, they concede that the Congress and the FCC can require, and have required,

Herald Publishing Co. v. *Tornillo*[103] for the proposition that a compulsory access requirement for political candidates would violate the First Amendment if it were applied to the *print* media. They argue that no decision of the Supreme Court has recognized an affirmative right of access to the broadcast media for any individual or group. The Court, the networks contend, has approved mandatory access schemes only where a broadcaster has triggered rights of reply by a specific programming decision—a contingent right of access, so-called.[104] They point to the Court's decisions in *CBS* v. *DNC*[105] and *FCC* v. *Midwest Video*[106] as indicating the unwillingness of the Supreme Court to authorize any affirmative right of access.

The network's reliance on *CBS* v. *DNC* and *Midwest Video* is misplaced. In *CBS* v. *DNC* the Court found that nothing in the language of the Communications Act *compelled* a conclusion different from that reached by the FCC, to wit, that the Commission *need not require* broad-

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broadcasters to grant access to political candidates *as a group* under the rubric of the public interest doctrine. Indeed, they cite the *dictum* in CBS v. DNC, 412 U.S. at 113-14 n.12 (1972), to show that the language of Section 312(a)(7) is nothing more than a codification of the public interest rule. On the other hand, they argue that the imposition of a burden of granting access to individual candidates for federal office is an impermissible interference with their editorial privileges. This seems disingenuous. The interference with editorial discretion seems no more or less under either approach.

[103] 418 U.S. 241 (1974).

[104] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 397 (1969).

[105] 412 U.S. 94 (1972).

[106] 99 S. Ct. 1435 (1979).

casters to accept paid political ads. The Court did not address the issue of whether it would be constitutional for the Commission to grant an affirmative right of access in broadcasting—even for the general public. It certainly did not reach the constitutionality of the rather limited and qualified rights of access made available to federal candidates only by Section 312(a)(7). In *Midwest Video*, the Supreme Court's decision turned entirely on statutory, not constitutional, grounds.[107]

It is true that the Eighth Circuit's decision in that case[108] did suggest that a *general* affirmative access requirement would be unconstitutional in *cable* television. But we are not reviewing an attempt by Congress or the FCC to create a general affirmative right of access —either in cable television or on the VHF channels. Rather, we confront a statutory provision creating a limited affirmative right of access in candidates for federal elective office—a provision which has been implemented in a concrete way by the FCC. Moreover, cable television is very different from VHF commercial broadcasting of the type involved here. For example, the

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[107] The Supreme Court reserved consideration of the constitutionality of a generally available affirmative right of access to cable television. 99 S. Ct. at 1446 n.19.

The heavy reliance of the networks on the *dictum* in CBS v. DNC regarding Section 312(a)(7) is plainly inconsistent with their arguments regarding the constitutionality of the FCC's attempt to impose a generally available affirmative right to access to cable television. It may be that the FCC's effort in that regard was unconstitutional—we do not as yet have a Supreme Court pronouncement on it. But the FCC's regulations for cable television were cited approvingly in *dictum* appearing as text (as opposed to *dictum* in a footnote) in CBS v. DNC, 412 U.S. 94, 313-32 (1972).

[108] 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd*, 99 S. Ct. 1435 (1979).

"scarcity" rationale used to justify FCC regulation in the first place has much less force with regard to cable television than with regard to VHF commercial broadcasting.[109] It is the constitutionality of *this* statute *as implemented* which we must consider.

The Supreme Court's opinion in *CBS* v. *DNC* provides support for the limited affirmative right of access at issue here. In that case, the Court reiterated the teaching of earlier cases that the broadcaster's editorial rights were less important than the rights of viewers and listeners.

> [W]e have held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency. . . . Although the broadcaster is not without protection under the First Amendment, "[i]t is the right of the views and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. . . ." [110]

It is worth noting that the limited affirmative right of access at issue here is vested in candidates for federal office. The public's right to be informed is nowhere stronger than in the area of elections. And, no speech is more protected than political speech.[111] Furthermore, in television we deal with a medium devoted exclusively to communication—and one which, by all accounts, is *the* medium of communication for most of our society. It is difficult to contend that the limited appropriation by

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[109] *See* Brandywine-Main Line Radio, Inc. v. Federal Communications Commission, 473 F.2d 16, 75-76 (1972) (Bazelon, Chief Judge, dissenting).

[110] 412 U.S. at 102 (1972) (citations omitted).

[111] *See* Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105 (1979).

government of part of the available spectrum for use in informing the electorate is constitutionally unacceptable.

As implemented by the Commission, Section 312(a)(7) provides such a right of affirmative access to a narrowly defined class of citizens. It authorizes access only for political "uses." And, the FCC has developed a procedure which affords leeway to the broadcaster's discretion: (1) the Commission confines its review to a consideration of the reasonableness of the broadcaster's explanation of his basis for refusing requested time, and (2) the reasonableness of the broadcaster's explanation is judged solely by whether he has duly regarded articulated standards.[112] The agency further limits the impact of Section 312(a)(7) on the broadcaster by limiting its applicability to the "political season" as objectively defined by the Commission.[113] This kind of limited allocation of the airwaves does not constitute an unwarranted incursion on editorial rights.

It is settled doctrine[114] that the government retains the power to decide how and to whom to allocate the air waves.[115] The right of "use" granted to the candidate

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[112] *See* Section IIIB *supra.*

[113] *See* Section IIIA *supra.*

[114] Elsewhere this writer has questioned the validity of the "scarcity" rationale as a justification for regulation of the broadcast media. *See, e.g.*, Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 Duke Law Journal 213, 223 (1975). It must be said, however, that the "scarcity" rationale is most valid when applied to VHF television. *Id.* And, these comments notwithstanding, it cannot be doubted that the power of the government to allocate radio and television frequencies has been upheld. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[115] *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 390-91 (1969) (the First Amendment confers no right on licensees

under Section 312(a)(7) does not confer on the candidate any right to interfere with what the broadcast journalist says or does on the air. Similarly, the broadcast journalist may not determine what the candidate says or does with the limited amount of air time available to him. Therefore, Section 312(a)(7) represents only a congressional re-allocation of the "use" of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired.[116]

The agency has defined its role and the rights of the candidates in such a way as to minimize the imposition on broadcasters. As implemented, Section 312(a)(7) is a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters.[117]

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to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use).

[116] The government practice involved here is analogous to reasonable time, place, and manner restrictions. Such restrictions have long been recognized as constitutionally acceptable. *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98 (1972); cf. Cox v. Louisiana, 379 U.S. 536, 554 (1965); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v. State, 308 U.S. 147, 160 (1939).

[117] The majority shares the first amendment concerns expressed by Judge Tamm, and welcomes the admonition regarding agency conduct that is embodied in his concurring opinion.

V. The Application of Section 312(a)(7) to the Networks

The networks argue that by its terms Section 312(a)(7) applies only to licensees—the Commission may revoke a "station license or construction permit." Thus, they say, the Commission erred in applying the mandate of Section 312(a)(7) to the networks.

The Commission construes Section 312(a)(7) as including two severable elements—one establishing a reasonable access obligation and the other a specific remedy. It contends that the obligation element is articulated in a way that does not expressly identify the entities subject to the obligation. The obligation is "to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station. . . ." Given the purpose of the statute, the FCC argues, it is reasonable to read Section 312(a)(7) as imposing an obligation to provide access not just upon individual stations but upon those who, by practice and contractual relationship, control the best practical means of efficiently acquiring national access—to wit, the networks.

When Congress created an explicit access obligation in Section 312(a) and amended Section 315(a) to reinforce the existence of such an obligation, it did so "to give candidates for public office *greater* access to the media so that they may *better* explain their stand on the issues and thereby *more fully and competely* inform the voters." [118] Plainly, Congress wanted to *enhance* the ability of candidates for federal office to communicate with the electorate. At the time, it already was established practice for networks to grant political time to presidential candidates seeking a national audience. Given its objective of expanding candidates' access to the

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[118] *See* note 32 *supra*.

people, Congress could hardly have intended to omit the most important channel of communication available to candidates.[119] The access right accorded to presidential candidates by Section 312(a)(7) would have been robbed of much of its intended significance if the candidate were forced to go from station to station around the country assembling his own network. The time, expense, and coordination difficulties of such an endeavor would deter many candidates, and would be impossible for others.[120]

The discussion in Congress surrounding the enactment of Section 312(a)(7) reveals that the legislators voting on the bill used the terms "broadcasting station," "broadcaster," "license," and "network" interchangeably.[121]

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[119] One aspect of the Commission's interpretation of networks-licensee obligations is worth noting here. Affiliates are likely to receive access demands in addition to those resulting from network offers of political programming. For example, presidential candidates seeking time on individual stations during local primaries, congressional candidates, and candidates for state and local offices may make requests to affiliates. The Commission recognized that "some individual affiliates might reasonably decline" to carry a political broadcast supplied by the network because of such special factors. App. at 314. Such flexibility is both necessary and laudable.

[120] The practical consequence of network immunity from Section 312(a)(7) would be most extreme in the final days of a general presidential election. Candidates would be forced to canvas the country for stations willing to broadcast last minute appeals to the voters. Congress could not have intended such a practical bar to televised communications between presidential candidates and the national electorate on the eve of an election.

[121] *See, e.g.*, 116 Cong. Rec. R. 5717, 5719 (1970) (remarks of Sen. Pastore), 5724 (remarks of Sen. Baker), 5732 (remarks of Sen. Yarborough), 5637 (remarks of Sen. Cotton), 8056 (remarks of Rep. Martin), 8057 (remarks of

Indeed, when presenting the Conference Report to the Senate, Senator Pastore, the bill's sponsor, referred to networks and individual broadcasters interchangeably.[122] Thus, there is support in the legislative history for the contention that Congress intended Section 312(a)(7) to apply to the networks.

Even if Section 312(a)(7) by itself does not afford the Commission power to mandate reasonable network access, such jurisdiction is "reasonably ancillary" to the effective enforcement of the individual licensee's Section 312(a)(7) obligations and, hence, within the Commission's statutory authority.[123] The Communications Act gives broad authority to the Commission to regulate all "interstate and foreign communication by wire, or radio," [124] and defines these communications as

> the transmission of . . . signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.[125]

Other substantive provisions of the Act dictate that the Commission is "to make special regulations applicable

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Rep. MacDonald), 8069 (remarks of Rep. Springer), 8071-72 (remarks of Rep. Broyhill), 8074 (remarks of Rep. Tiernan), 8075 (remarks of Rep. Vanik), 8078 (remarks of Rep. Murphy), 8082 (remarks of Rep. Springer), and 8083 (remarks of Rep. Eckhardt).

[122] 117 Cong. Rec. S. 21638 (daily ed., 92d Cong., 1st Sess., Dec. 14, 1971).

[123] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[124] 47 U.S.C. 152(a) (1976). *See also* National Broadcasting Company, Inc. v. United States, 319 U.S. 190, 219 (1943).

[125] 47 U.S.C. 153(a)-(b) (1976).

to radio stations engaged in chain broadcasting," [126] to "encourage the larger and more effective use of radio in the public interest,[127] and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." [128] Moreover, in applying these provisions, the Commission can regulate network practices that do not serve the "public interest, convenience, and necessity." [129]

The Supreme Court confirmed the broad and expansive authority of the Commission to regulate broadcasting activities in *U.S.* v. *Southwestern Cable Co.*[130] There, the Commission had issued cable system signal carriage rules even though the Communications Act did not expressly authorize regulation of the cable industry. The Court stated:

> The Commission has reasonably found that the successful performance of [its broad responsibilities for the orderly development of an appropriate system of local television broadcasting] demands prompt and efficacious regulation of community antenna television systems. . . . [W]e may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." [131]

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[126] 47 U.S.C. 303(i) (1976).

[127] 47 U.S.C. 303(g) (1976).

[128] 47 U.S.C. 303(r) (1976).

[129] 47 U.S.C. 302(a) (1976).

[130] 392 U.S. 157 (1968).

[131] *Id.* at 177, *quoting* Permain Basin Area Rate Cases, 390 U.S. 747, 780 (1968).

The Court defined the Commission's authority to regulate as

> restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.[132]

The Commission's action in applying Section 312(a)(7) to the networks is an exercise of its power "reasonably ancillary" to the effective enforcement of the provision.

VI. Mootness

Prior to oral argument, the court asked the parties to submit papers addressing the question of mootness. The court's request was prompted by the fact that CMPC had agreed to accept a 5-minute segment on CBS in December and had contracted to buy a 30-minute segment on ABC in January. The Petitioners, the Respondents, and CMPC as *amicus curiae* submitted briefs on this question. The parties unanimously contended that the cast is not moot. We agree.

This case presents a situation where a short-term administrative order is "capable of repetition, yet evading review." *Southern Pacific Terminal* v. *ICC*, 219 U.S.

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[132] *Id. See also* Mt. Mansfield TV, Inc. v. FCC, 442 F.2d 470, 480 (1971); General Telephone Co. of Calif. v. FCC, 413 F.2d 390, 403 (1969). In contrast to FCC v. Midwest Video Corp. (*Midwest II*), which is cited by the networks, the Commission here imposed on the targets of its ancillary jurisdiction (the networks) an obligation of a character which *could* be imposed on individual television licensees. Congress itself has identified reasonable access to broadcast facilities as a statutory goal. Clearly, the Commission has authority to regulate the networks "with a purpose affirmatively to promote [a] goal pursued in the regulation of television broadcasting."

498, 515 (1911). The Supreme Court has recently articulated two conditions implicit in the *Southern Pacific* formulation:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.[133]

Here it is clear we have a short-term situation. Moreover, it is certain that the parties will confront each other in this situation again.

In the context of elections where fragile rights are at stake, courts must be careful to avoid dismissing litigation as moot.[134] In *Flory* v. *FCC*,[135] for example, the Seventh Circuit rejected a contention that an appeal of an FCC decision under Section 315 was mooted by the fact that the election in question had already occurred. Indeed, the Supreme Court has indicated that utilization of the "capable of repetition" exception is especially appropriate where the issue is the interpretation of a statute that impacts upon the electoral process.

> The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks [on a statute]. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the

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[133] Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2904 (1979), *quoting* Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

[134] *See, e.g.*, Moore v. Ogilvie, 394 U.S. 814 (1968).

[135] 528 F.2d 124 (7th Cir. 1975).

> likelihood that timely filed cases can be adjudicated before an election is held.[136]

That is exactly the case at hand.

VII. Conclusion

We hold today that Section 312(a)(7) of the Communications Act does create an affirmative right of access in candidates for federal elective office.

We hold that, in implementing this right of access, the FCC has articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access. Under these standards, the obligation (or lack thereof) of a network or licensee to provide access to a candidate for federal office is judged in two stages. First, no request for time need be granted prior to the start of the election campaign, a date determined by the Commission with reference to all relevant facts and circumstances. Second, once the campaign has begun, individual requests by candidates must be treated *individually* by the network or licensee. They may be denied only with advertence to factors enunciated by the Commission, and the reasons for denying the *individual* request must be articulated. Across the board denials will not be tolerated. The Commission, for its part, will not substitute its judgment for that of the network or licensee in handling individual requests. It will confine itself to the task of ensuring that the broadcaster has considered and addressed all the relevant factors in the individual case and that the offered explanation for the decision is reasonable.

We hold that Section 312(a)(7), thus interpreted, is consistent with the requirements of the Constitution.

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[136] Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

We hold that the FCC is justified in applying Section 312(a)(7) to the networks.

And, finally, we hold that in the cases before us the Commission properly found that the networks had failed to fulfill the obligation imposed upon them by Section 312(a)(7).

We therefore affirm.

So ordered.

TAMM, *Circuit Judge, concurring*: When government regulation of our system of freedom of expression [1] calls for a federal agency to decide whether and to what extent the "individual needs" of particular candidates for federal office demand that they be heard on the radio and television airwaves, the danger of nonneutral government decisionmaking raises grave first amendment concerns. Although I join Judge Bazelon's fine opinion for the court, I write separately to discuss the danger that I perceive and to explain my reasons for concurring despite this danger.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Supreme Court held that the first amendment does not always prevent the federal government from regulating radio and television broadcasts on the basis of their content. In particular, the Court endorsed the Federal Communications Commission's "fairness doctrine," which imposes a twofold duty on the broadcaster: "The broadcaster must give adequate coverage to public issues, and coverage must be fair in that it accurately reflects the opposing views." *Id.* at 377 (citations omitted). In the form approved by the Supreme Court,[2] the fairness doctrine imposes only a general obligation on broadcast licensees, and broadcasters retain wide flexibility concerning the manner in which they will satisfy this obligation.[3] The Court has stated that the Commis-

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[1] *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

[2] The Court's decision in *Red Lion* did not require "approv[al] of every aspect of the fairness doctrine." 395 U.S. at 396.

[3] "At center stage of the Commission's regulatory scheme is its determination that broadcasters should have maximum editorial discretion in deciding how to fulfill fairness doctrine obligations." American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S.Ct. 662 (1980).

sion's only responsibility under the doctrine "is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 127 (1973).

The Court in *Red Lion* also affirmed the constitutionality of three right-to-reply doctrines. Two of these, the "personal attack" and the "political editorial" rules, are administratively developed offshoots of the general fairness doctrine:

> When a personal attack has been made on a figure involved in a public issue, . . . the individual attacked himself [must] be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine.

395 U.S. at 378. The third right-to-reply doctrine, the equal-time rule, is statutory in origin. Section 315 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 315 (1976), provides: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ."

Id. § 315(a). *See Red Lion Broadcasting Co.* v. *United States*, 395 U.S. at 391.[4]

Under *Red Lion*, "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount," *id.* at 390, particularly when what is at stake is " 'speech concerning public affairs,' " *id.* (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964)). *See also FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-800 (1978). Nonetheless, the first amendment also values broadcaster discretion. As Chief Justice Burger noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973),

> [The] role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

Id. at 117 (opinion of Burger, C.J.). As Judge Bazelon's opinion persuasively demonstrates, the limited access scheme created by section 312(a)(7) of the Act, 47

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[4] These right-to-reply doctrines would be intolerable if applied to the print media. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). A different rule applies to broadcasters on the theory that it is legitimate for the government to allocate the use of a finite number of broadcast frequencies, and it is therefore legitimate for the government to reallocate part of the use of a frequency previously granted to a particular licensee. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 388-92. *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 282 (1933).

U.S.C. § 312(a)(7) (1976), as interpreted and applied by the Commission, is consistent with these principles.

There is another principle, however, that limits the ability of the government to regulate broadcasting: although the government may play a role in regulating the content of broadcast communications, that role must be carefully neutral as to which speakers or viewpoints are to prevail in the "marketplace of ideas." Thus, while the government may properly take action to encourage a wide-open debate on public issues,[5] *see Buckley* v. *Valeo*, 424 U.S. 1, 92-93 & n.127 (1976), it may not regulate in a manner that advances "one side of an issue rather than the other," A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).[6] As Justice Stevens noted in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.* at 745-46 (opinion of Stevens, J.). *See Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1034 (D.C. Cir. 1971) (there is a "requirement of government neutrality in the area of the First Amendment"). *See also Red Lion*

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[5] This country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[6] There is a similar requirement of neutrality under the establishment-of-religion clause of the first amendment, in that government may not "prefer one religion over another." Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The requirement of religious neutrality goes further, however, by precluding the government from aiding the cause of religion generally, even if it could do so without favoring any particular religion. *See id.* The government is, on the other hand, permitted to further the general cause of freedom of expression. *See* Buckley v. Valeo, 424 U.S. 1, 92-93 & n.127 (1976).

Broadcasting Co. v. *FCC*, 395 U.S. at 396 (constitutional problems would arise if "the official government view [were to] dominat[e] public broadcasting"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943) (constitutional problems would arise if the Federal Communications Commission were authorized "to choose among applicants [for licenses] upon the basis of their political, economic or social views"). *Cf. Buckley* v. *Valeo*, 424 U.S. at 48-49 (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").[7] Accordingly, broadcast regulation must be tailored to guard against government action that is nonneutral, *i.e.*, government action that, by purpose or effect, tends to enhance the persuasive appeal of a particular speaker or viewpoint vis-à-vis opposing speakers or viewpoints.[8]

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[7] Judge Bazelon analogizes the government action here under review to a "time, place, and manner" restriction. Maj. Op. at 46 n.116. Significantly, however, such restrictions may not " 'slip from the neutrality of time, place, and circumstance into a concern about content.' " Police Dep't v. Mosley, 408 U.S. 92, 99 (1972) (quoting Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1, 29). Although broadcast regulation may to some extent "slip into a concern about content," it may not lose sight of the fundamental requirement of neutrality as between particular speakers or viewpoints.

[8] The requirement of neutrality here, as in other contexts, may be "notoriously difficult" to define. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). At least as to its "effect" component, for example, the requirement cannot be absolute; it would be impracticable to demand that content-based regulation never operate to favor, even in the slightest degree, one viewpoint over another. *See also* note 9 *infra*. One thing is clear, however: whatever its application in other contexts, the principle of neutrality is at its zenith in the context of

The broadcast regulation approved in *Red Lion* is consonant with this first amendment principle. The basic fairness doctrine protects against government nonneutrality by leaving broad and flexible discretion with the broadcaster; the Commission's circumscribed role in enforcing broadcaster obligations allows little opportunity for nonneutral government decisionmaking. The right-to-reply doctrines also limit the potential for partiality, this time by virtually eliminating the need for discretion on the part of anyone: if the licensee broadcasts a specified type of communication, the applicable right-to-reply obligation arises in a relatively "automatic" fashion.[9] More important, except for the very general[10] and rarely enforced[11] first prong of the basic fairness

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political speech. Difficulty of definition, of course, does not negate the importance of the basic constitutional requirement, nor does it excuse the judiciary from the task of formulating and applying fundamental principles of constitutional law.

[9] To be sure, even in deciding whether a fairness or a right-to-reply obligation has attached and, if so, whether it has been satisfied, the Commission might take action that improperly favors a particular speaker or viewpoint. This limited danger, however, is one that we tolerate because of the countervailing first amendment benefits that these doctrines generally produce by encouraging a balanced coverage of issues of public importance. *See also* note 8 *supra*.

[10] *See* American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 444 n.16 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S.Ct. 662 (1980); Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine*, 65 CAL. L. REV. 546, 578-86 (1977).

[11] The first prong of the fairness doctrine, the obligation to devote adequate broadcast time to the coverage of public issues, has been only minimally enforced by the Commission. *See* Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*,

doctrine, which requires adequate coverage of public issues, all of the regulatory devices approved in *Red Lion* are designed to ensure that a broadcaster who presents one side of a controversy will balance that coverage with a broadcast of the opposite view. This is the essence of evenhandedness, the antithesis of partiality.

Section 312(a)(7), as interpreted and applied by the Commission, presents a different and more suspect form of regulation. It is designed not to achieve a balanced presentation of ideas, but rather to grant air time to particular speakers for initial presentations of their views. The broadcaster obligation it creates, unlike that under the first prong of the fairness doctrine, is specific in nature and, as this case suggests, is likely to be enforced with some vigor.

The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the "individual needs" of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his "individual needs" against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for

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10 HARV. C.R.-C.L. L. REV. 137 (1975). "[T]he obligation to present controversial issues has been essentially unenforced The Commission has consistently sought to avoid even the appearance of regulating the content of programming and thus has continually left to the licensee's discretion the determination of which issues are sufficiently important and controversial to warrant coverage." *Id.* at 153. Indeed, at least in the view of two commentators, the obligation had *never* been enforced prior to the Commission's 1976 decision in Representative Patsy Mink, 59 F.C.C.2d 987 (1976). *See* Simmons, *supra* note 10, at 578-82; Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 739 (1974).

example, that a candidate requesting a half hour for a particular purpose may instead by entitled to only fifteen minutes, *see* Maj. Op. at 35-36; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.

Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's "individual needs," whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves. Although the Commission's standards are designed to apply neutrally to all candidates, and call for a rather deferential oversight of broadcaster determinations, there is nonetheless a much greater potential than in *Red Lion* for government favoritism, perhaps wholly unintentional, of particular speakers and ideas.[12]

Moreover, unlike the regulatory approaches upheld in *Red Lion*, section 312(a)(7) deals solely with candidates for federal political office; in evaluating the danger of government nonneutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests.[13] Although the Commission is independent of his

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[12] As CBS correctly observes, there is an "inherent danger in having a federal agency make determinations as to how much access and what kinds of access particular candidates should have, a danger which exists because of the risk that the agency under such circumstances could favor one candidate over another." Reply Brief of Petitioner CBS Inc. at 14.

[13] CBS contends that "[t]he inherently political nature of the question to be considered will draw the Commission into situations where its impartiality will be subject to obvious question. The danger that standards will not be applied

direct control, the President of the United States appoints all seven of its members and designates its chairman. *See* 47 U.S.C. § 154(a) (1976). Commissioners serve seven-year terms, and vacancies occur approximately once a year. *Id.* § 154(c).[14] To the extent that openings arise, the President may, and typically does, ensure that four of the seven Commissioners are members of his own political party. *See id.* § 154(b).[15] As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking.[16]

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neutrally necessarily suggests the unconstitutionality of the system of government regulation." Brief for Petitioner CBS Inc. at 44 (citation omitted).

[14] In fact, due to deaths and resignations, many recent Presidents have been able to make more than one appointment per year. *See* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 184 (1978).

[15] Even the limitation that no more than four Commissioners may be members of the same political party "is evaded easily if an appointee is willing to be labeled an 'independent.'" *Id.* at 184 n.36.

[16] Regrettably, there is some evidence that the Commission has, on occasion, been subjected to direct political pressure. In a 1970 memorandum describing administration efforts to

Despite these dangers, however, section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression.[17] Candidate access to radio, and especially television, is exceedingly important in a nation that places such extraordinary reliance on these informational media,[18] and we dare not forget that there is

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achieve more favorable press coverage by the three major television networks, Charles Colson, Special Counsel to then President Richard M. Nixon, indicated that, "as soon as we have a majority," he would pursue with Dean Burch, the newly-appointed Commission Chairman, a Commission ruling that would have "an inhibiting impact on the networks." Memorandum from Charles W. Colson to H.R. Haldeman, Sept. 25, 1970, *reprinted in* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 247. In a taped conversation in 1972, President Nixon himself threatened to use the Commission to retaliate against *The Washington Post* for unfavorable coverage: "The main, main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it renewed." Statement of Richard M. Nixon to H.R. Haldeman and John Dean, Sept. 15, 1972, *quoted in* S. REP. No. 981, 93rd Cong., 2d Sess. 149 (1974) (final report of Senate Watergate committee). For a further discussion of the potential for political use of the Commission, see Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137, 157-58 (1975). *Cf.* Columbia Broadcasting Sys., Inc. v. FCC, 454 F.2d 1018, 1036 (1971) (Tamm, J., concurring) (concluding, "although hesitantly, [that in the case then under review] the Commission ha[d] taken a political role of interference contrary to all of the teachings of administrative decision-making").

[17] *See also* Buckley v. Valeo, 424 U.S. 1, 92-93 & n.127 (1976); note 6 *supra*.

[18] In a 1974 survey of prominent educators, businessmen, labor leaders, and government officials, television was rated the most powerful institution in the United States. The

also a potential for evil in leaving the question of access in the hands of private broadcasting interests. As the Supreme Court warned in *Red Lion*, we should guard against

> station owners and a few networks [having] unfettered power to make time available only to the highest bidders, to communicate only their views on public issues, people and candidates, and to permit on the air only those with whom they agree[]. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

395 U.S. at 392.[19] By creating a right of access in favor of candidates for this country's highest offices, section 312(a)(7) increases the opportunity for these speakers to reach listeners with the discussion of crucial political issues.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance

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White House ranked second, the Supreme Court third. *Who Runs America? A National Survey*, U.S. NEWS & WORLD REP., Apr. 22, 1974, at 30. *See also* S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 1-2 (1978).

[19] *Cf.* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 62 (D.C. Cir. 1972) ("The first amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many."), *cert. denied*, 412 U.S. 922 (1973).

> that candidates have the unfettered opportunity to make their own views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. *Valeo*, 424 U.S. 1, 52-53 (1976).[20] To give increased play to ideas touching the very essence of our democracy is a goal that surely lies near the heart of the first amendment.

Thus, section 312(a)(7), as implemented by the Commission, stands precariously on the first amendment tightrope. It raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another. Yet it also makes a great contribution to the cause of encouraging an "uninhibited, robust, and wide-open"[21] discussion of issues central to our system of government.

We could not give effect to the statute's positive contribution to first amendment values in the absence of adequate safeguards for controlling the danger of nonneutrality. In my view, the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity. In particular, the Commission is strictly limited to the narrow role of overseeing broadcaster determinations concerning access, determinations that are entitled to great deference before the Commission. Moreover, both at the broadcaster level and before the Commission on review, analysis of the "individual

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[20] *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the [first amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office").

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See* note 5 *supra*.

needs" factor must focus solely on the candidate's needs *as stated by the candidate* and, giving due consideration to the other relevant standards set forth by the Commission, how those needs can be accommodated by the broadcaster. The agency is obliged to affirm any broadcaster decision that is reasonable under the Commission's articulated standards, and it disapproved the network decisions in the present case only because the networks had, in effect, imposed "flat bans" on the sale of the type of time that the Carter-Mondale Committee sought. If the networks had instead given reasonable consideration to the particular request that was made, the Commission would have had no choice but to approve their access decisions.[22]

The Commission, through its implementation of section 312(a)(7), has come perilously close to falling into the chasm of impermissible government action. Nonetheless, as long as the agency consistently maintains a very limited "overseer" role consistent with its obligation of careful neutrality, its action does not contravene the Constitution. With this understanding, I concur in the opinion of the court.

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[22] Another significant factor in deciding the constitutionality of § 312(a)(7), as implemented, is the presence of the equal-time provision in § 315 of the Act, 47 U.S.C. § 315 (1976). Section 315 generally will create a right to reply in favor of the opponents of any candidate granted access under § 312(a)(7), thus serving as an important safety net by mitigating the effect of any nonneutrality that might creep into the § 312(a)(7) decisionmaking process. If this were not the case, § 312(a)(7), as implemented, would raise a different and more troublesome constitutional question. That question, of course, is one for another day.

APPENDIX B

FCC 79-750

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE COMPLAINT OF
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

against

THE ABC, CBS and NBC TELEVISION NETWORKS

MEMORANDUM OPINION AND ORDER

(Adopted: November 20, 1979;
Released: November 21, 1979)

BY THE COMMISSION: COMMISSIONERS FERRIS, CHAIRMAN AND FOGARTY ISSUING A SEPARATE JOINT STATEMENT; COMMISSIONERS LEE, WASHBURN AND JONES DISSENTING AND ISSUING STATEMENTS; COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT.

1. On October 29, 1979, the Commission received a complaint from the Carter-Mondale Presidential Committee, Inc. (the Committee) under the "reasonable access" provision of Section 312(a)(7). The Committee alleges that the ABC, NBC and CBS Television Networks violated the provision by refusing to sell it a thirty-minute prime time program to be used by the President in his capacity as a candidate for the Democratic nomination. The Committee states that the time requested will be used for an appearance by the President shortly after he declares his candidacy; that whether the President is a legally qualified candidate is not an issue since

none of the networks have made a claim to the contrary; and that in any event there should be no question as to whether he is legally qualified once a formal declaration of candidacy has been made.

2. The Committee claims that the reasons given by the networks for their refusal to sell the time are "totally insufficient to justify their actions." Specifically, it states that the contention of NBC and ABC that it is "'too early' to begin a presidential campaign" is "insufficient" since significant amounts of news coverage have been devoted to the campaign and "actions speak louder than words"; that the allegation of CBS and NBC that they would have to honor requests of other candidates is "sufficient" since there is a "relatively limited number of national candidates . . . that are willing and able to purchase network . . . time"; and that CBS' allegation that "it would involve 'massive disruptions' of [its] regular . . . schedules" is "insufficient" because only a few half-hour periods of entertainment programming would have to be rescheduled. In this connection, it states that CBS has offered to sell a five-minute period at 10:55 p.m on December 8, 1979 and another in the daytime. However, the Committee claims that "[i]t is past the four day time period requested, insufficient in amount and unsuitable to the needs of the candidate." The Committee also states that further evidence of the networks' attitude toward their political broadcasting responsibilities can be found in newspaper articles enclosed with the complaint.

3. The Committee argues that there is no question as to whether the Commission has jurisdiction to resolve this matter since the Commission has "long recognized" that the networks as licensees of the "most important broadcast stations in the nation" are subject to its jurisdiction. To support this argument, the Committee cites a Commission policy statement where we stated that po-

litical broadcasting rate restrictions would be applicable to networks since networks are, in effect, selling time on behalf of their affiliates. The Committee further argues that the networks' refusals to sell the requested time constitutes a "blatant denial of reasonable access." It requests that the Commission order the networks to make time available for purchase.

4. On October 30, 1979, the Broadcast Bureau requested the networks' comments on the complaint by November 5, 1979. All three networks claim that their refusal to sell the requested time at this point cannot be found to be an abuse of discretion and that therefore the complaint should be denied. They argue that such sales are presently premature and that their decisions are reasonable in light of the unusually large number of candidates seeking the major party presidential nominations. Specifically, ABC states that at least nine candidates have already declared that they will seek the Republican Party nomination, and that a major Republican leader and two major Democratic leaders have indicated that they will announce in the next few weeks. CBS states that at least three Democrats and eleven Republicans are reasonably expected to seek the presidential nomination. NBC states that there are at least twelve actual or potential candidates seeking the presidential nomination that have held federal elective office or been governor of a state, plus at least 110 others that have filed notices of candidacy with the Federal Election Commission. They also argue that the complainant's assertion that there will only be a "relatively limited" demand for network half-hours is purely speculative and that the potential for significant disruptions in normal schedules is real and substantial. Both ABC and NBC contend that a single state caucus should not be sufficient to trigger access to *national* network time and that since the Democratic convention will not be held until August, their decision to deny the Committee's request cannot

be found to be unreasonable. ABC and CBS both assert that although the Committee is technically correct that only other Democratic party candidates would be entitled to "equal opportunities," they do not believe that they could reasonably decide to grant access to the Democratic Party and refuse access to the Republican Party.

5. NBC argues that the question before the Commission is whether the network was unreasonable in reaching its decision and that its judgment cannot be ruled unreasonable in light of the fact that it has considered the factors specified in the Commission's July 1978 Public Notice relating to the enforcement of Section 312(a)(7).[1] NBC asserts that during the preconvention period, the campaigns are waged on a state-by-state basis and are best covered by the communications media serving the state in question. NBC contends that it does not appear that Section 312(a)(7) applies to networks since it applies to the use of a "broadcasting station" and it is contained in a section of the Communications Act relating to license revocation. It claims that even were the networks to carry the program in question, there is no assurance that individual stations would choose to broadcast it; that the sale of the requested time period would require it to afford equal opportunities to the President's legally qualified opponents for the Democratic nomination; and that absent significantly different factual circumstances, similar access periods would have to be made available to legally qualified candidates for the Republican nomination. NBC states that it does not generally sell individual program periods to commercial advertisers and that the Commission itself has recognized that reasonable access requires only that the licensee follow its usual commercial practices. NBC urges the Commission to recommend that Congress repeal or suspend Section

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[1] *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978).

315 so that broadcasters will be able to establish "reasonable limits to the forced disruption of program schedules [necessary] to present candidates in which the public has little or no interest."

6. ABC claims that the only question posed by the complaint relates to *when* access should be granted and that this question may not properly be before the Commission inasmuch as it comes on behalf of a person who is not yet a legally qualified candidate. It states that it has decided to sell political time to candidates seeking nomination at the national political conventions beginning with the first week of January 1980 and that this decision is warranted in light of the nature and length of the presidential campaign. ABC anticipates that numerous requests for time will be made during the period leading up to the national election. It asserts that its continuing news coverage of the campaign insures that "the mixture of issues, developments . . . and personalities that dominate this early stage of the campaign are brought to the public's attention."

7. In response to the Committee's claim that the networks' news coverage of the campaign should be taken as evidence that the compaign has begun, ABC points out that the legislative intent in adopting the news coverage exemptions of Section 315 was to foster news coverage of political campaigns. In light of this intent, ABC argues that journalistic pursuits should not be used as a trigger for the "reasonable access" provision since such a policy would inhibit news coverage of the campaign.

8. CBS states that it has offered to sell two five-minute time periods to the Committee and that this offer is "fully consistent with the reasonable access provision." It asserts that campaigns for the presidential nomination consist of a series of state primary elections, conventions and caucuses conducted on local levels over many months. CBS contends that in its judgment the public interest

does not require preemption of extensive segments of its national programming for half-hour political broadcasts at this point in the campaign. It argues that although the complainant asserts that it does not intend to make such purchases a regular practice, it cannot bind other candidates in this regard and that while complainant argues that this matter should be viewed in light of the candidates' needs and not the networks' beliefs, prior Commission decisions make clear that the candidates' desires are not always paramount and that broadcasters have substantial discretion in this area.

9. CBS states that its decision is supported by Commission precedent. Specifically, it cites *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972), where the Commission stated that the standard of review in Section 312(a)(7) cases is one of reasonableness, and *Letter to Paul A. Talmey*, 49 FCC 2d 678 (B/c Bur. 1974), where the staff acknowledged that a five-minute time segment constitutes a program. It also cites our decision in *Complaint of Hon. Pete Flaherty*, 48 FCC 2d 838 (1974), where we emphasized that we would not prescribe a precise formula for measuring compliance with Section 312(a)(7) and our 1978 policy statement where we stated that "the public is entitled to other kinds of programming than political." Although CBS recognizes that there is a distinction between senatorial and presidential races, it also relies on *Anthony R. Martin-Trigona*, 66 FCC 2d 968 (B/c Bur. 1977), *aff'd* 67 FCC 2d 743 (1978), where the staff denied a complaint of a candidate in a United States Senate primary that a licensee's refusal to sell him announcement time until forty-five days before the election violated Section 312(a)(7). Despite the fact that the Committee's complaint involves a presidential campaign and not a senatorial campaign, CBS argues that an adverse Commission ruling in this matter would be irrecon-

cilable with the cited authorities because CBS has not refused to sell prime-time program time to the candidate.

10. The complainant's response in opposition to the comments submitted by the networks was filed with the Commission on November 8, 1979. The Committee takes issue with the networks' assertion that it is "too early" to sell the requested time. It argues that the "national presidential campaign is now well underway" [2] and that the "networks cannot simply follow their prior practices" because "Campaign 80" is different from previous election years. It argues that CBS has failed to consider the candidate's needs in reaching its decision; that the purpose of the proffered program is to "set the tone for the [President's] entire campaign"; and that this purpose cannot be accomplished at a later date.

11. Citing the networks' claim that the preconvention campaigns are conducted on a state-by-state basis, the complainant argues that the campaigns now underway are "not a series of isolated local elections, but integrated, nationwide efforts." It asserts that "[w]hile the preconvention period focuses on obtaining delegates from the various states, it reality presidential nominating campaigns are nationwide in scope." As to the networks' contention that there is a "multiplicity of candidates" problem, the Committee states that 14 candidates is not an "inordinate number, particularly when . . . the networks have access obligations only toward candidates for [the one] office [in question]" and that even assuming

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[2] To support this allegation, the Committee relies on the following facts: (1) CBS altered its regular programming to move its documentary on Senator Edward M. Kennedy to November 4, 1979 so that it would precede his announcement of candidacy; (2) CBS news has reported that the Kennedy campaign is "getting into full swing"; and (3) a debate between Senator Kennedy and President Carter will be held on January 7, 1980.

that all 13 other candidates would desire to make a similar purchase, the networks would only have to make one half-hour, per week, per network available.

12. Regarding the networks' claim that substantial programming disruptions would result from the sale of the requested time period, the Committee argues that it gave the networks "considerable leeway in providing availabilities" and that the networks regularly make scheduling changes for their own commercial purposes. The complainant further argues that if a "multiplicity of candidates" problem in fact exists, then the networks would have a responsibility to solve the problem by making time available early in the campaign and that of all the broadcasters in the country, the networks are in the "weakest" position to raise the "multiplicity of candidates" defense since they have only one group of candidates to serve, namely Presidential candidates.

13. The complainant asserts that the networks place "excessive reliance on the traditional licensee discretion concept" since this concept was modified by Congress when it enacted Section 312(a)(7). If further asserts that the "essential purpose of enacting Section 312(a)(7) was to place new and additional obligations on broadcasters with respect to candidates for federal office."

14. On November 9, 1979, the National Association of Broadcasters (NAB) filed comments on the matter.[3] It argues that in view of a "mounting series of court decisions [upholding] the vital First Amendment interest in shielding journalistic decisions made by broadcasters . . . from Government second-guessing," it is of the "utmost importance that the reasonable access provision be interpreted . . . in light of a standard which gives great weight to the editorial discretion of broadcasters." The NAB

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[3] The NAB filed its comments as *amicus curiae*, to "underscore the interest of broadcast licensees in this proceeding."

claims that the networks' decisions not to sell half-hour programs to Presidential candidates until sometime in early 1980 is "clearly not unreasonable" since the Democratic National Convention will not be held until August 11, 1980.

15. The Committee responded to the NAB's comments in a letter dated November 9, 1979. It states that "to the extent that First Amendment considerations are involved in this matter, they firmly support the Committee's complaint" because Section 312(a)(7) promotes the goals of the First Amendment. The Committee further states that the NAB's "business as usual approach . . . to the positive duties imposed upon broadcasters by Section 312(a)(7) shows the importance of the issues raised by the Committee and the need for a definitive ruling" and that the "NAB's concerns for its membership go far beyond the precise issue which is now before the Commission. . . ."

16. On November 13, 1979, comments were received from the National Citizens Committee for Broadcasting (NCCB), a nonprofit public interest group. NCCB states that it agrees with the Committee's contention "that Congress intended that candidates, not broadcasters, should determine when campaigns begin and when political broadcast time should be purchased." NCCB also agrees with the Committee's assertion that it is the "viewers' rights to be informed . . . that were the basis for the enactment of Section 312(a)(7) and that are primarily violated by the networks' refusal." NCCB asserts that "the Commission should find that the current presidential campaign is in full swing and the networks' willful refusal to provide a half-hour of prime time to the Committee violates Section 312(a)(7)." NCCB requests that the Commission clarify two points: (1) whether the networks would have a responsibility to provide time to all legally qualified candidates regardless of party affiliation

once they provide time to Carter, and (2) whether President Carter will be a legally qualified candidate after he announces his intention to seek reelection even though he may not have qualified in ten states.

Discussion

Statute and Legislative History

17. Section 312 provides in pertinent part as follows:

> (a) The Commission may revoke any station license or construction permit—
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> * * * * *
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The statutory language thus authorizes the Commission to revoke a broadcast station license for failure to allow a candidate's reasonable uses of broadcast facilities. The statutory language, however, does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them.

18. The legislative history of Section 312(a)(7) does little to clarify those responsibilities and procedures. In considering Title I of S. 382, the Federal Election Campaign Act of 1971, the Senate Commerce Committee added the language that is now Section 312(a)(7).[4] The Senate

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[4] Title I of S. 382 as passed by the Senate also made exceptions to the equal opportunities requirement of Section 315(a) for Presidential and Vice Presidential candidates. In addition, it set maximum rates to be charged any candidates for Federal office. For the 45 days before a primary election and 60 days before a general election, the rates could not exceed the station's lowest unit charge for the same amount

Report on S. 382 establishes that one purpose of Title I was to "give candidates for public office greater access to the media." S. Rep. No. 92-96, 92d Cong., 1st Sess., p. 20 (1971). The second purpose was to "halt the spiraling costs of campaigning for public office." *Id.* The *Report* adds little more to the rationale underlying Section 312(a)(7). It merely comments that the obligation imposed in 312(a)(7) "is inherent in the requirement that licensees serve the needs and interests of the [communities] of license," and cites the Commission's 1960 *En Banc Programming Inquiry*. S. Rep. No. 92-96, *supra.*, at 34.

19. The floor debates are equally uninstructive. Senator Pastore, the floor manager of S. 382, explained the purposes of Title I and listed five steps the bill proposed to accomplish its goals. He did not mention Section 312(a)(7). *See* 117 Cong. Rec. 28792 (1971).

20. In trying to discern the purpose of Section 312(a)(7), it should be remembered that that provision was part of a statute that required broadcasters to charge candidates no more than the lowest unit charge in effect during the 45 days before a primary election and 60 days before a general election. *See* 47 U.S.C. § 315(b)(1). It could be argued that Section 312(a)(7) should therefore be applied only during those periods. That argument does not seem to be a cogent one, however. If Congress intended Section 312(a)(7) to be read in conjunction with Section 315(b)(1), it would have stated that or at least provided some indication of that intention (i.e., by

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and class of time. Before that, they could not exceed the charges for comparable use. Title I also limited campaign spending by candidates. The Conference Committee deleted the Section 315(a) exceptions.

Title I of the 1971 Act was replaced by the Federal Campaign Act Amendments of 1974. Section 312(a)(7), however, was not amended or discussed.

placing the provisions in the same section. We therefore believe that Congress wanted Section 312(a)(7) to operate independently of Section 315(b)(1). This seems especially so since the predecessor bill to S. 382 had an access clause as a proviso to Section 315 amendments, which provided for lowest unit charges. *See* S. 3637, 91st Cong., 2d Sess., April 15, 1970. Congress then made a decision to distinguish the access clause from the lowest unit charge clause.

21. In the absence of further direction, we must also assume that Congress wanted to delegate to the Commission broad responsibility to define and implement the scope of Section 312(a)(7)'s rights and duties. *Cf.* 47 U.S.C. §§ 154(i) and (j) and 303(r).

22. *Jurisdiction.* Before addressing the specific factors and procedures applicable to a determination under Section 312(a)(7), we must first consider our jurisdiction to act. NBC contends that Section 312(a)(7) does not apply to networks. It points out that that provision refers to use of a "broadcasting station" and that section is contained in a section of the Communications Act dealing with license revocation.

23. We believe that NBC's argument is contrary to Commission precedent. The Commission has interpreted the term "broadcasting station" to refer to networks as well as licensees, albeit in a different context. There are two separate factors which warrant this conclusion: first, the networks themselves are television licensees and, second, in many programming matters the networks also act as agents for their respective affiliates. In interpreting the "lowest unit charge"[5] provision which refers to use of a "broadcasting station," for example, we stated that:

> The Commission is of the view that although the Campaign Communications Reform Act does not spe-

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[5] 47 U.S.C. 315(b)(1).

> cifically refer to networks, the provisions are intended to apply to the purchase of network time. A network is in a real sense selling time on behalf of station licensees and the Commission interprets new Section 315(b)(1) as applying to the combination of licensees in the network as well as to the individual licensees.

Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, 525-26 (1972).

24. Similarly, in construing the "equal opportunities" [6] provision which also refers to use of a "broadcasting station," the Commission stated that:

> Although Section 315 obligations attach to individual station licensees, where a complaint is based on a network program and addressed to a network organization . . . the Commission has always accepted this approach as a basis for issuance of a ruling on the matter. Additionally, it may be noted that each of the networks involved herein are licensees of their "owned and operated" broadcast stations.

Senator Eugene McCarthy, 11 FCC 2d 511, n.1 (1968).

25. We see no reason for adopting a different approach in cases arising under the "reasonable access" provision of Section 312(a)(7).[7] The fact that the provision is contained in a section of the Communications

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[6] 47 U.S.C. 315(a).

[7] We also draw upon analogous case law under Section 303(i), 47 U.S.C. § 303(i). There the question was whether the term "radio stations" in Section 303(i) encompassed both the networks and the individual licensees for purposes of imposing on both the Commission's prime time access rules. The Court of Appeals held that networks were "radio stations" for purposes of Section 303(i). *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 481 (2d Cir. 1971).

Act dealing with license revocation does not constitute sufficient justification for a departure from the above cited precedent. In adopting Section 312(a)(7), Congress was surely aware of the networks' role in political broadcasting and the Commission view that the use of the term "broadcasting station" in the statute was sufficiently broad to give the Commission jurisdiction over the networks. *See, e.g., Committee for Fair Broadcasting*, 25 FCC 2d 283 (1970); and *Eugene McCarthy, supra.* If Congress wanted to apply a more restrictive definition of "broadcasting station" in Section 312, it had ample opportunity to do so. Instead, the Congress used language similar to that found in Section 315 and did not even suggest a narrower reading. Therefore, we must assume that Congress approved a continuation of our administrative practice. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). We believe that the legislative intent in enacting Section 312(a)(7) was both to impose a general obligation of access on the broadcast media and to establish license revocation as one remedy for violation of that obligation.[8] We will, therefore, interpret Section 312(a)(7) as applying to the combination of licensees in a network as well as to individual licensees. This interpretation is not only the most reasonable one under the circumstances but also one that is supported by cases which recognize that the Commission

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[8] We thus construe Section 312 as including two severable elements—one establishing a "reasonable access" obligation and the other a specific remedy. We note that in the element of Section 312(a)(7) which imposes an obligation to afford reasonable access, there is no specific phrase limiting the obligation's applicability to local broadcast stations. Our construction of the statute's applicability is consistent as well with our view that the phrase "broadcasting station" includes networks and with the Congress' basic purpose in adopting Section 312(a)(7).

has ancillary jurisdiction to regulate matters closely tied to its express statutory obligations.[9]

26. Our past precedent is not the only factor on which we base our conclusion that Section 312(a)(7) should be interpreted to apply to networks. We recognize that networks sell time as a unit on behalf of their licensees to presidential candidates. In view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312(a)(7).

27. Moreover, as noted above, the purpose of Section 312(a)(7) was to impose a general obligation of access on broadcasters. A ruling consistent with NBC's contention would mean that there would be no method of securing national access for presidential candidates to the chain of network affiliates other than to go to the individual affiliates themselves. We find that Congress did not intend the reasonable access obligation in Section 312(a)(7) to have such severe, practical limitations. In light of the significant role of the networks in the broadcasting industry and Congress' obvious knowledge of that fact, it would be unreasonable to conclude that Congress intended

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[9] Even if Section 312(a)(7) does not directly impose an obligation on the networks, such an obligation is clearly imposed on network-affiliated licensees under the statute. Our power to adjudicate complaints involving requests for access to the networks is surely "reasonably ancillary to the effective performance of the Commission's various responsibilities. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see, e.g., National Broadcasting* v. *United States*, 319 U.S. 190 (1943); *Mt. Mansfield Television, Inc.* v. *FCC*, *supra.*, 442 F.2d at 481-87; *Metropolitan Television Co.* v. *FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961); and the statutory provisions cited therein.

to exempt the networks from the requirement of Section 312(a)(7).[10]

28. *Section 73.1940(a).* The Committee contends that the question as to whether the President is a legally qualified candidate is not an issue since none of the networks has raised the question. We have ruled otherwise. Thus, in *Anthony R. Martin-Trigona (WGN)*, 67 FCC 2d 743, 745 (1978), the Commission stated:

> [T]he burden is on a complainant to establish that he qualifies under Commission Rules as a legally qualified candidate before the Commission will take action on a complaint filed under Section 315 or 312(a)(7) of the Communications Act. This is true whether or not a licensee has claimed that the candidate is not legally qualified (footnote omitted).

29. The only information that the Committee has provided to show that the President has qualified within the meaning of Section 73.1940 is a statement that he will announce his candidacy prior to the proffered program. However, a public announcement standing alone is not sufficient to satisfy our definition of a legally qualified candidate. Under Section 37.1940(a)(1)[11] a candidate must also show that he has qualified for the Presidential primary ballot in the state in question or that he has

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[10] Insofar as it may be argued that the reach of the "reasonable access" obligation in Section 312(a)(7) can extend only to those persons granted "any station license or construction permit," we note that each of the network corporations is a multistation licensee fully reachable by our revocation authority. But, in any event, we do not agree that the substantive Section 312(a)(7) obligation is to limited in its reach as to extend only to network corporate entities that happen to be also Commission licensees or permittees.

[11] Obviously, the President has satisfied the criterion regarding his eligibility to hold the office.

made a "substantial showing of bona fide candidacy" in the state. To qualify nationwide, a candidate must satisfy this requirement in at least ten states. The Committee has provided no evidence to show that the President has made a "substantial showing of bona fide candidacy" in any state or that he has qualified for any state primary.

30. The Committee has said, however, that the President will have met the qualifications for candidacy in ten states on or before the earliest date of the requested broadcast time. Neither CBS nor NBC considers this issue to be a bar to the granting of the candidate's request, since neither network raised it as a reason for denial of time. ABC did raise the issue tangentially in a footnote in which it noted that the President was "not yet" a legally qualified candidate. However, ABC offered nothing to contradict the Committee's contention that the President would be a qualified candidate prior to the date of the broadcast. Nor did ABC base its decision on this point. In circumstances where the candidate (through his representative) has said he will be a qualified nationwide candidate on or before the date for which he requests network time and no one has cast any doubt on the factual accuracy of the candidate's assertion, it would be inconsistent with the intent of Section 312(a)(7) for the networks to deny access on that basis or for the Commission to decline to review the networks' decisions.[12] In these

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[12] This is particularly so here where the initial step to becoming a qualified candidate is entirely in the candidate's hands. All he has to do is make an announcement of candidacy. The qualification of filing before state election authorities to obtain a place on the ballot is largely ministerial and often follows almost immediately upon the announcement of candidacy. In lieu of filing with the state authorities, the presidential candidate may show that he had engaged in political campaign activities in the requisite number of states. 47 CFR §§ 73.1940(a)(4)(ii) and (a)(5).

circumstances, we read the "legally qualified" language as having an implicit temporal reference to the date(s) of requested access not the date of the request. This is not to say, however, that the networks would be acting unreasonably in another context of denying access in part on the basis of a factual dispute over whether the candidate will be legally qualified on the access date requested. But, in the present context of undisputed fact, it would be contrary to the purpose of Section 312(a)(7) for the networks not to be obliged to rule on the access request (or for the Commission not to review the networks' decisions) until the candidate has formally announced and become qualified. The delay involved in such a procedure might make it impossible for a candidate to obtain Commission relief in time to fulfill his plan of using his reasonable access rights promptly after his announcement of candidacy. And even if the networks were otherwise inclined to grant access, the last-minute scheduling disruption which would result from postponing the request and response until the legal qualification process was technically completed, might tend to discourage a grant of access. However, if the President is not a legally qualified candidate nationwide at the time of the broadcast, the networks need not honor the President's request for time.[13]

31. *Reasonable Access.* On July 12, 1978 the Commission adopted a *Report and Order*[14] clarifying its policy in enforcing Section 312(a)(7). There we reaffirmed our policy of relying on the "reasonable, good faith judgments of licensees as to what constitutes reasonable access under

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[13] We believe that the foregoing discussion answers NCCB's request that we "clarify" whether the President will be a legally qualified candidate prior to the proposed broadcast.

[14] *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978) (*Report and Order*).

all of the circumstances present in particular cases." [15] the Commission would consider in evaluating any com- We made it clear, however, that the broadcaster's discretion is not unlimited. We set forth specific factors that plaint that a broadcaster was not acting reasonably.[16] The identified factors which we consider relevant to a Section 312(a)(7) judgment are: the candidate's needs, the number of candidates, and the availability of classes of time. 68 FCC 2d at 1090. While each of these factors is relevant, we placed particular emphasis on the candidate's needs. Thus, we stated that:

> Federal candidates are the intended beneficiaries of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access.

68 FCC 2d at 1089, n. 14. In taking this factor into account, the licensee is not simply to substitute its judg-

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[15] 68 FCC 2d at 1094.

[16] In evaluating "reasonable access" complaint (including the instant one) we apply a mode of analysis analogous to that which the courts use in reviewing discretionary decisions by an agency. In determining whether the agency violated the Administrative Procedure Act by acting in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)), the reviewing tribunal must take a hard look to see whether the decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). In the instant context, we may not simply substitute our de novo judgment regarding the access request and the networks' responses, but must "judg[e] the objective reasonableness" of the networks' explanation of their actions. *Straus Communications, Inc.*, v. *FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976).

ment regarding the candidate's needs for the candidate's own assessment of those needs, but the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against other factors which we have said are relevant. The Commission further stated that, absent unusual circumstances, "reasonable access" requires that a candidate be afforded program time in prime time. However, we recognized that an offer of prime time program time itself is not enough. The candidate must also be afforded flexibility to address the prime time audience in the manner best suited to his campaign. For instance, we explained that:

> . . . an *arbitrary "blanket" ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee.*

68 FCC 2d at 1090 (emphasis added).

32. In assessing the candidate's needs, of course, consideration has to be given to the dynamics of the particular campaign and the point in a campaign at which a licensee's obligation to afford reasonable access begins. In this regard the Commission stated that:

> The setting of such a limit is difficult because each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates. *For instance, a presidential campaign may be in full swing almost a year before an election;* other campaigns may be limited to a short concentrated period.

68 FCC 2d at 1091 (emphasis added).

33. The Commission concluded that Section 312(a)(7) would take effect at least during the periods when the "lowest unit charge" provision was applicable. Accordingly, we stated that a licensee would be unreasonable in refusing to afford access within 45 days prior to a primary and 60 days prior to a general or special election. The determination as to whether "reasonable access" obligations would attach before these periods for particular races was left to be decided on a case-by-case basis.

34. The question of when access should begin has only been decided by the Commission in the context of non-presidential federal candidates. One case involved a candidate for the U.S. Senate whose request to purchase broadcast time was refused by a radio station licensee in August, 1977, for a primary election scheduled for March 21, 1978. The Broadcast Bureau denied that candidate's complaint under Section 312(a)(7) on the ground that he was not a legally qualified candidate. *Anthony R. Martin-Trigona*, 66 FCC 2d 968 (1977). Subsequently, on January 2, 1978, that same licensee began to sell time to the complainant. The Commission later denied complainant's petition for reconsideration on the ground that licensee was not unreasonable in providing access beginning 78 days before the primary election. *Anthony R. Martin-Trigona*, 67 FCC 2d 743, 747 (1978). However, that case offers little guidance for purposes of determining when reasonable access should be granted to presidential candidates. To begin with, when that case came before the full Commission there were less than 78 days until the election, and the broadcaster had agreed to sell time to the candidate. Moreover, that case merely involved a statewide candidate looking toward a single primary election. By contrast, we are faced here with national candidates who are looking toward a series of primary elections, caucuses, and other nominating processes in virtually all 50 states. The nomination of candidates to the nation's highest office is a uniquely important proc-

ess that requires special consideration as to when access to the broadcast media should begin.

35. In light of the conclusion that we reached in our July 1978 *Report and Order, supra.*, the test to be applied to determine whether the networks have complied with the "reasonable access provision" is one of reasonableness.[17] Thus, the reasons that each network has given to support its decision must be examined in light of the specified factors to determine whether each can be said to have acted reasonably and in good faith in fulfilling its obligations under Section 312(a)(7). In analyzing the networks' responses, we recognize that our decision concerns First Amendment interests—both those of the general public in full-ranging debate on electorate-informing issues and those of broadcast journalists in preserving their editorial discretion. While the constitutionality *vel non* of Section 312(a)(7) is basically a matter for Congress and the courts, we must interpret the statute, if possible, to effectuate Congress' intent while not unnecessarily impinging on the broadcasters' journalistic discretion.[18]

36. *NBC.* Applying the foregoing principles to the facts and circumstances presented here, we cannot find that NBC's policy, as applied to the President, reasonably fulfills its obligations under Section 312(a)(7). De-

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[17] In making judgments as to reasonableness, we note again the purpose of Section 312(a)(7)—to enlarge the basic fiduciary obligations of broadcasters to inform the electorate by making the media more accessible to federal candidates. *See* paragraph 18, *supra.*, and our *Report and Order, supra.*, 68 FCC 2d at 1087 and 1089. *See also Red Lion Broadcasting* v. *FCC, supra.*

[18] The reasonableness standard we use for review in 312(a)(7) cases, like the "reasonable and good faith" review standard in Fairness cases, must be applied with First Amendment interests in mind. See *Straus Communications Inc.*, v. *FCC, supra.*, 530 F.2d at 1001, 1008-9, 1011.

spite the emphasis that our July 1978 *Report and Order, supra* placed on the consideration that must be given to candidates' needs in making reasonable access decisions, NBC has apparently given no consideration to the Committee's determination that "the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States"; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date.

37. Moreover, as the Committee has pointed out, the reasons that NBC has in fact given to support its decision are "insufficient" and in the absence of further explanation we are unable to find that it acted reasonably in affording federal candidates access to its facilities as required by Sections 312(a)(7). NBC, in essence, cites three reasons to support its decision: (1) timing; (2) "multiplicity of candidates"; and (3) programming disruptions.

38. *Timing.* The Commission's 1978 *Report and Order, supra* recognized that a presidential campaign may be in full swing a year before the election. Yet NBC argues that at this point the campaigns are being waged on a "state-by-state" basis and that a national campaign has not yet begun. This argument is based on the assumption that the date of the national convention which is eight months away, is the relevant date in determining when "reasonable access" obligations should attach.[19]

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[19] As part of its "timing" argument, NBC also asserts that in the 1976 campaign, half-hour segments were not sold to candidates until March 31, 1976. While we recognize that a broadcaster's past practices in this area may be a relevant consideration, we do not believe that it is sufficient to justify a refusal to sell time. As the Commission stated in the July

39. We agree with the Committee that the 1980 presidential campaign has begun much earlier than previous campaigns and is already in full swing. We base our judgment on undisputed evidence submitted by the Committee, as well as matters which we can officially notice. For example, it is undisputed that 10 candidates have already formally announced their intention to seek the Republican presidential nomination; two candidates have already formally announced their intention to seek the Democratic nomination and a third, President Carter, states that he will make his formal announcement within a couple of weeks.[20] Various states around the country have begun the delegate selection process, including straw polls, which are attracting the attention and efforts of the major party contenders.[21] The candidates, however, are not confining their activities to those states where events are occurring prior to January 1, 1980. They and their

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1978 *Report and Order, supra* at 1091, "each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates."

[20] Philip Crane, August 2, 1978; Benjamin Fernandez, January 10, 1979; John Connally, January 24; Harold Stassen, February 21; George Bush, May 1; Robert Dole, May 14; John Anderson, June 8; Larry Pressler, September 25; Howard Baker, November 1; Edward Kennedy, November 7; Jerry Brown, November 8; Ronald Reagan, November 13; President Carter will announce on December 4.

[21] *See, e.g.*, "The Lessons of Florida," *The Washington Post*, October 15, 1979, p. A-1 (Florida had Democratic caucuses on October 13 and will have a Democratic Convention on November 16-18); "Kennedy, Carter Agree to Iowa Debate," *The Washington Post*, November 7, 1979, p. A-1 (Iowa had a Democratic straw poll on November 3 and will have a Democratic caucus on January 21, 1980); "Bush Upsets Field in Informal Ballot by the Maine GOP," *The New York Times*, Sunday, November 4, p. A-1.

representatives are traveling widely all over the country speaking to groups and trying to raise funds for their campaigns.[22] National campaign organizations have been established and are operating.[23] The Iowa caucus will result in the selection of delegates pledged to a particular candidate and, as indicated in footnote 21, *supra.*, will take place on January 21, 1980. All this campaign activity has induced public participation. Public officials and private groups are making endorsements now—even though the states in which the endorsers are located do not formally select convention delegates for many months to come.[24] Finally, it must be acknowledged that the national print media has given these campaign activities prominent coverage for almost two months.[25] In this

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[22] *See, e.g.*, "The President's Partner," *Newsweek*, November 5, cover story; "The Kennedy Challenge," *Time*, November 5, cover story; "Cosmic Candidate: Jerry Brown Runs to Protect the Earth," *The Wall Street Journal*, November 8, p. 1.

[23] *See, e.g.*, "Strauss to Chair President's Campaign," *The Washington Post*, November 6, p. A-1; "Kennedy Authorizes a Campaign and Plans Declaration for November 7," *The New York Times*, October 30, p. A-1; "Tales of a Reagan Field Organizer," *Newsweek*, November 5, p. 53.

[24] *See, e.g., The New York Times*, Friday, November 2, p. A-19 (The International Union of Electrical Radio and Machine Workers endorsed Kennedy); *The New York Times*, Sunday, November 4, p. E-1 (Chicago Mayor Jane Byrne endorsed Kennedy, Coordinator for Refugee Affairs Dick Clark quit the Administration to work for Kennedy, and Middle East negotiator Robert Strauss resigned to work on Carter's campaign).

[25] *See, e.g.*, footnotes 18-21, *supra. See also, The New York Times:* front-page articles on October 15, 19, 20, November 2, 5, 6, 7, 8, 9, 12, 14; *The Washington Post:* Front-page articles on October 19, 20, 24, 30, November 2, 4, 9, 11, 12, 13,

context, the only reasonable conclusion to be drawn is that the campaign is in full swing now.[26] This conclusion also supports the Committee's contention that "[i]t is unrealistic even to suggest that the Presidential electoral process leading up to the convention is merely a series of isolated, local and state matters." The Commission recognizes that the campaign in question is for a *national* and not just a local office and that the primaries in effect determine the outcome of the convention in that the delegates are bound to vote for the prevailing candidates. Accordingly, the primaries are an integral part of the national convention, and it would not be reasonable to characterize them as isolated, local events. Thus, as the complainant has stated: "[w]hile the pre-convention period focuses on obtaining delegates from the various states, in reality the Presidential nominating campaigns are nationwide in scope." In view of the foregoing, we cannot find that NBC acted reasonably in concluding that a national campaign has not yet begun.

14; *The Wall Street Journal:* front-page articles in October 23, November 9; *Newsweek:* cover stories on May 2, September 25; *Time:* cover stories on September 24; *Broadcasting:* Special Report on November 5.

[26] There is evidence that the broadcast media, including the networks, have also given prominent coverage to campaign activities. ABC argues that the Commission should not rely on broadcast news coverage as a basis for finding the campaign to be in full swing. In its view, such reliance would "chill" their coverage of campaign activities. We wish to emphasize that our conclusion regarding the level of campaign activity here *is not* dependent on broadcast news coverage. The level of campaign activity, as shown above, reflects facts that exist independently of any broadcaster's news judgment. Were we to hold otherwise, it would mean that a broadcaster could deny a candidate reasonable access simply by refusing to provide news coverage of a campaign.

40. "*Multiplicity of Candidates.*" The gist of NBC's "multiplicity of candidates" argument is that there are a total of 122 [27] candidates seeking the presidential nomination; and that if its refusal to sell the requested time is found to be unreasonable, absent significantly different factual situations, logic would indicate that similar access periods also be made available to legally qualified candidates for the Republican nomination.[28]

41. In our July 1978 *Report and Order, supra,* we indicated that "multiplicity of candidates" is an appropriate factor to consider in determining whether to grant access to a particular candidate. Implicit in this statement is the idea that other candidates might request simi-

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[27] It should be pointed out that not all of these candidates have qualified within the meaning of our rules. These candidates have only filed notices of candidacy with the FEC. From our previous experience, it is unlikely that more than a small percentage of these candidates will, in fact, become legally qualified candidates as defined in Section 73.1940(a).

[28] In this connection, NCCB requests that we make clear whether the networks would have an obligation to provide time to all legally qualified candidates for President regardless of party affiliation once they provide time to President Carter. We recognize that the candidate's right of access under Section 312(a)(7) may be invoked regardless of the candidate's party affiliation. This contrasts with the candidate's equal opportunities right under Section 315 which comes into play in the preconvention or prenomination phase only when another candidate of the same party affiliation has been granted access. However, our ruling today depends upon the interconnected process (caucuses and primaries culminating in a convention) described above. Where other processes are used, complaints arising under those circumstances may require different results. In any event we believe that such questions are better left to be decided on a case-by-case basis in light of the particular facts and circumstances of each case.

lar amounts of time. Accordingly, we cannot conclude that NBC acted unreasonably in considering the Republican candidates as well as the Democratic candidates in determining whether a "multiplicity of candidates" problem in fact existed.

42. However, although NBC may not have been unreasonable in considering the number of candidates for the Republican nomination, the Commission still recognizes, as the Committee has pointed out, that the networks, unlike other broadcasters, have only one group of candidates to serve—presidential candidates. Not only is it unlikely that more than a small percentage of candidates filing with the FEC will become legally qualified under our rules (footnote 27, *supra*), but it is highly improbable that all of the 122 candidates who have filed with the Federal Election Commission will have the financial resources necessary to purchase a half hour of network prime time. In this case, in fact, the committee seeks to buy time on only one network. Accordingly, we cannot find that NBC acted reasonably in determining that such a "multiplicity of candidates" existed that the sale of the requested time was not warranted.[29]

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[29] We have noted that the interplay of Sections 312(a)(7) and 315 might give rise to a multiplicity of Section 315 "equal opportunities" requests following an appearance by one candidate in a multi-candidate field on a station pursuant to a reasonable access request by that candidate. Yet in accord with a practical interpretation of the Act, under Commission policy, once a candidate has used a broadcast facility he or she is not generally entitled to another use under Section 315 following a subsequent appearance by an opposing candidate. Barring unusual circumstances, such as a particularly long period between appearances, this policy would foreclose a candidate who has already appeared on a station from receiving "equal time" as a response to an appearance by an opposing candidate pursuant to the latter's 312(a)(7) request.

43. *Programming Disruptions.* The Commission has considered program availability as a factor but has never stated that the possibility of programming disruptions will constitute sufficient justification for refusing to grant "reasonable access." [30] Indeed, this latter factor was not among those that we cited as relevant to "reasonable access" determinations in our July 1978, *Report and Order, supra.* We recognize that programming disruptions were discussed in our 1972 policy statement, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 FCC 2d 510, 536 (1972). However, that was in another context. There the Commission was discussing reasonable access requests made in the *closing days* of a campaign. Thus, we stated that:

> Congress clearly did not intend to take the extreme case that during the closing days of a campaign stations be required to accommodate requests for political time *to the exclusion of all or most* other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. (emphasis added).

While NBC emphasizes the disruptive impact of political broadcasts, we must repeat that the provision of time for such programming is an essential element of the public interest obligations of broadcasters. Especially during presidential campaigns, such broadcasts contribute toward informing the electorate on issues of public importance

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[30] In considering the availability of time factor, *Report and Order, supra,* 68 FCC 2d at 1090, we were concerned with the sale of spot announcements because of Commission policies concerning the sale of commercial time. *See* 47 C.F.R. § 0.281 (a) (7). NBC's allegation that it has only two half-hour weekly series provides no support for NBC's refusal to sell time to the Committee.

to the nation. These are concerns of importance to be weighed by us and broadcasters when making decisions on "reasonable access."

44. In this case, the request for time was made far in advance of the closing days of the campaign and nearly two months prior to the broadcast date. Furthermore, as the Committee has stated, "it gave the networks considerable leeway in providing availabilities" in that it listed four alternative dates for the broadcast, and we recognize that the networks in fact make frequent scheduling changes for their own commercial purposes. Accordingly, we cannot conclude that NBC acted reasonably in determining that the potential for programming disruptions was so substantial that it was justified in refusing to make the requested time available.

45. In light of the foregoing, the reasons given by NBC to support its decision are deficient when subjected to our test of reasonableness. On the basis of the information provided, NBC's refusal to sell any time at this point in the campaign amounts to the type of "arbitrary, 'blanket' ban" that was deemed to be unreasonable in our July 1978 *Report and Order, supra.* Accordingly, we cannot conclude that NBC was reasonable in refusing access to a presidential candidate, and we must find that its policy fails to comply with the requirement of Section 312(a)(7).

46. *ABC.* ABC, like NBC, failed to give any consideration to the needs of the candidate in reaching its decision. In essence, it bases its decision on the same three reasons relied upon by NBC, that is timing, "multiplicity of candidates," and programming disruptions. As stated above, we believe that these reasons are deficient.

47. The Commission recognizes that ABC has stated that it will sell time to candidates for the presidential nomination beginning with the first week in January

1980. However, ABC has provided no satisfactory explanation to support its decision in formulating its policy with respect to political sales. This omission is especially glaring in light of the compelling conclusion that the national presidential campaign is already in full swing. On the basis of the information that has been provided, and the analysis set out more fully in connection with NBC, we are unable to find that ABC acted reasonably in affording Federal candidates access to its facilities and must find that it has failed to fulfill its obligations under Section 312(a)(7).

48. *CBS.* The gist of CBS' response, like those of the other networks is that its refusal to sell the 30 minutes of requested time is reasonable in light of three factors: (a) timing, (2) "multiplicity of candidates" and (3) programming disruptions. For the reasons stated in our discussion of NBC's response, we cannot find that these reasons are sufficient to justify a blanket refusal to sell the time; nor can we find that these reasons are sufficient to justify CBS' policy of limiting its sales to candidates to five-minute segments.[31] CBS has provided no information to show that it gave any consideration to the candidate's desires as to the best method of conducting his media campaign. Indeed, it appears that long before it received the Committee's request, CBS established a policy of not selling more than five-minute segments.[32] This

[31] It should be stressed that we are not suggesting that five-minute segments do not contribute to the fulfillment of a networks' reasonable access obligations to presidential candidates; and that our ruling that such a segment is not sufficient is limited to the facts and circumstances of the particular case before us.

[32] On page 25 of its comments, CBS indicates that it has adopted a uniform policy of selling five-minute programs to candidates "during this pre-primary phase." Although the date on which this policy was adopted has not been specified,

policy might be reasonable under some circumstances. But here, CBS has ignored the complainant's statements that the time offered is "totally insufficient" in amount to present the "detailed and thoughtful" picture of the administration's record envisioned by the Committee, and that "[t]his purpose could not be accomplished later." [33] Thus, it has failed to comply with the mandate of our July 1978 *Report and Order*, *supra*, that "[a] Federal candidate's decision as to the best method of pursuing his media campaign should be honored as much as possible under the *reasonable* limits imposed by the licensee" (emphasis added). We find this failure especially unfortunate here. The presidency is our highest public office and the only one which networks must accommodate in selling time on a nationwide basis. In this context, the offer of a five-minute program segment appears to be an unreasonable response to the particular request here. Even if all 13 major party candidates were entitled to equal treatment, CBS' policy would result in the sale

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it appears that it was sometime in September prior to the Committee's request. As early as September 14, CBS received a request for a half-hour period, five five-minute programs and a fifteen minute program from John Connally and responded by offering two five-minute segments. Similarly, in response to a September 21 request for a half-hour for Ronald Reagan, CBS offered two five-minute segments. In light of the fact that CBS responded to the Connally request in the same manner as it responded to the Reagan and Carter requests, despite the fact that different amounts of time were requested, it would appear that it adopted a uniform policy with respect to political sales sometime in September.

[33] We emphasize that the networks should, in the circumstances presented here, give consideration to the nature of the candidate's request. In particular, here the candidate expressed a desire to set forth at the outset of a national campaign a comprehensive statement of views and to establish a framework for the organization and issues in the campaign.

of only 65 prime time minutes—a total of miniscule proportions when it is realized that there are approximately 5400 minutes available in prime time in a single month. Accordingly, in view of its failure to provide an adequate explanation, we cannot find that CBS has acted reasonably in affording Federal candidates access to its facilities and must find that it has acted in violation of Section 312(a)(7).

49. In light of the foregoing, we find that the networks acted unreasonably in discharging the obligations imposed upon them by Section 312(a)(7) of the Communications Act.[34]

50. Accordingly, each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obigations on or before November 26, 1979.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[34] The Commission has the obligation to accommodate the potentially conflicting concerns of the public, the broadcasters and the candidates. In interpreting Section 312(a)(7), as well as Section 315, we will make every attempt to do so in an equitable and practical manner. We would, however, remind all parties to these matters of what we said in 1972 in *Use of Broadcast and Cablecast Facilities*, 34 FCC 2d at 536:

> One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations. Such conferences might cover, among other things the subjects of the amount of time that the station proposes to sell or give candidates, the amount and types of its other programming, the seven-day rule, and the amount of advertising it proposes to sell to commercial advertisers.

In short we believe that good faith negotiations are to be preferred and urge that course.

SEPARATE STATEMENT OF CHARLES D. FERRIS, CHAIRMAN AND COMMISSIONER JOSEPH R. FOGARTY

Finding the moment in time when a candlidate for federal office becomes entitled to "reasonable access" under Section 312(a)(7) of the Communications Act to purchase time from broadcasters to address the public is especially difficult. What is paramount to this determination is the public interest in an informed electorate.

In evaluating that interest, today's order attaches deference on this question to the judgments of candidates themselves, as well as to the judgments of broadcasters. In doing so, we do not imply that the great deference paid to broadcaster judgments concerning news coverage of an election campaign is in any manner reduced.

We hold today only that candidates for nomination for federal office, as well as licensees, should be able to play a role in deciding when they will be able to purchase time for discussing their candidacies with the electorate. This is not a wholly new concept. We adopted an order last year specifying that candidate concerns should be weighed by broadcasters along with other factors.

Of course, a candidate's judgment as to the timing of a bid for office is not dispositive of the question of the commencement of an overall nomination or election campaign for purposes of this section of the Communications Act. For instance, an individual who announces his or her candidacy for an election several years off cannot expect to capture automatically the reasonable access rights of the statute by such unilateral action. The Commission should look to the particular conditions in existence in each case to determine whether the campaign in question is truly "in full swing."

In the Presidential context, not every campaign can be expected to have begun as early as the current one. Moreover, in making that judgment, the FCC must consider

program time availability, particularly in light of the number of candidates seeking office. But inquiry along those lines is limited. Utter denial of reasonable access for candidates because of slight disruption in programming cannot be countenanced.

The campaign for the major party nominations for the 1980 Presidential election, in our view, is "in full swing." This judgment is based on the extrinsic factors presented by the complainant in this case and those of which we have taken official notice: the number of announced candidates, the extensive organization efforts being made by candidates nationally; the commencement of delegate selection procedures in some states; and the widespread attention being paid by the print media to candidates announced and expected to announce.

It is important, however, that the Commission find that a campaign be already ongoing and not permit its determination to be the decisive factor turning an incipient campaign into a full-fledged one. Otherwise, this agency would become not merely a referee in determining some of the rules of the election contest, but the trigger pin of its starting gun as well. We believe we have avoided that danger in this case.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

"Happy Turkey Day"

Although thinly disguised as a procedural point about the completeness of network pleadings, the decision here is far reaching. It reverses the precedent that a complainant be a candidate when seeking relief from the Commission and establishes a new precedent of conditional candidacy. It creates for the first time a network obligation to provide access under Section 312(a)(7), not just equal opportunities under Section 315 of the Communications Act. It establishes an obligation for national access

early in a campaign for the nomination—from the time of a candidate's announcement if he is getting media attention—whether or not primaries, caucuses, or conventions are imminent in more than one or two states.

The majority's analysis suggests that we should think about a national primary or caucus. But, that isn't how the system works. The contest for delegates to the nominating convention and supporters for a candidate is still carried out in each of the states. There is no national time schedule and no common election day at this point in the campaign. Months separate the critical decisions to be made in the various states. While people may be curious about events across the country, this curiosity does not create a national right to access to network time. It simply suggests a topic for network news coverage.

Because of the differences in timing among the various states, stations in these states do not have a uniform access obligation under Section 312(a)(7). Indeed, at this point most stations in the country could properly reject a request for access or could decide not to clear a network campaign program. Nationwide access to the individual stations as a matter of right is simply premature. Yet, the majority finds that networks, which it treats as agents of their affiliates for political broadcast purposes, have an access obligation most of their affiliates do not have. The Commission should not impose an obligation on the agents which it cannot directly impose on the affiliates.

This is not analogous to our treatment of networks under Section 315 where we expect networks to make equal opportunities available once they have offered access. The reason is simple. When a network has offered access, each station carrying the campaign program has an obligation to provide equal opportunities. However, if an opposing candidate has to seek access to each separate affiliate, he will be placed at an extreme disadvantage.

To prevent possible abuses, we have said that a network offering access must also offer equal opportunities. The decision about when to offer the first access has been left with the networks—until today.

I appreciate the majority's contention that this decision is really a narrow procedural one which requires the networks to consider the Carter-Mondale campaign needs. However, in making the procedural point this decision leaves no doubt about the range of the networks' discretion. They may negotiate details of timing. They may not exercise their legitimate editorial judgment by rejecting the access request because of its prematurity. In my opinion this decision is a serious abuse of the Commission's discretion.

I dissent.

DISSENTING STATEMENT OF
COMMISSIONER ABBOTT WASHBURN

The campaign Committee asked for time in early December. ABC has offered to make the requested time available in early January. So what is involved is a 30-day delay. Should the FCC require the networks to accede to the December timetable under Section 312 (a) (7), the "reasonable access" section of the statute? The January offer, in my judgment, is not unreasonable.

Contrary to the result reached by the majority in today's action, the facts and circumstances of the case compel the conclusion that the January offer *is* "reasonable access" under the statute. The public would receive eight months of political advertising during the pre-convention period; and the public and the candidates could look forward to another heavy dose during the post-convention months. From January until the election in November is a long political "season"—more than long enough to serve the public interest in an informed electorate.

Nor do the equities in the case favor the Carter-Mondale complaint. Since the President, as the incumbent, can command more free time than any other candidate, he is less disadvantaged by the one-month delay than any of the other candidates. As for the other considerations, I am sympathetic to the networks' concern over the multiplicity of candidates, a factor we set ourselves. *Commission Policy in Enforcing Section 312(a)(7) of the Act.* 68 FCC 2d 1079, 1090 (1978). If the networks are required to sell political advertising to one Presidential candidate in December, they must do so for all 12 of them, if requested, regardless of party.

Aside from the impact today's decision will have on television access during the 1980 election, the majority also has established an unfortunate precedent for future presidential elections. The proposition which their decision will stand for is that the candidate's own determination of his needs is overriding. The consequences of this precedent will rise to haunt the Commission and the public in future campaigns. For example, Philip Crane announced his candidacy in August, 1978, two years before the nominating convention and twenty-seven months before the election. John Connally announced in January, 1979, George Bush and Robert Dole in May, John Anderson in June. A case could be made by their Committees that the campaign was "in full swing" last summer. Clearly, a candidate's determination that the campaign has begun should not be the determinative factor under the "reasonable access" requirement.

But of all the legal problems involved in our requiring the networks to sell time in December, the most troublesome by far is the question of the FCC's interfering with the discretion of the broadcasters and substituting our judgment for theirs. I believe we should assiduously avoid doing this unless the question of unreasonableness

is very clearcut. A one-month delay in this instance is not clearly unreasonable. Therefore I dissent.

DISSENTING STATEMENT OF COMMISSIONER ANNE P. JONES

The networks have made the relatively narrow determination that they will not sell time to the Carter-Mondale Committee on certain specified dates in December 1979. I do not believe the Commission should substitute its judgment for that of the networks absent a clear showing that the networks have acted in an unreasonable manner. In my judgment, the facts of this case provide no such showing.

STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

This complaint raises some very fundamental issues which I find particularly difficult to resolve. These issues are difficult because they require the FCC to make some very subjective judgments in the emotionally-charged atmosphere of a political campaign.

First, there is a technical question which arises out of the fact that Mr. Carter is not yet an announced candidate. It could be argued that the entire matter isn't properly before us since the request for time was not made ". . . by a legally qualified candidate for federal elective office on behalf of his candidacy." * Mr. Carter has made it clear that he intends to make a formal announcement prior to the proposed broadcast. Thus, I do not regard the lack of a formal announcement as decisionally significant under the circumstances.

On the substantive issue—whether the time requested constitutes "reasonable" access—Section 312(a)(7) provides no guidance to what is "reasonable." This matter

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* Section 312(a)(7), Communications Act of 1934 as amended.

is particularly difficult for me because I have urged—and I continue to urge—that the Congress strike Section 312(a)(7) from the statute. While I oppose it on First Amendment grounds, the matter before us also demonstrates some very practical reasons why we shouldn't be deciding matters of tactical significance to candidates. Whatever my personal philosophy might tell me about the wisdom of the statute, however, I am charged with the responsibility of enforcing it.

I can understand why the Congress elected to use the "reasonable access" language instead of something more precise. It's clear that presidential election campaigns have a dynamism all their own which does not encourage precise timetables or definitions.

My own background in broadcasting provides me with some insight into the motivations of the networks in refusing the request for time at this early stage of the campaign. First, the networks are in a very competitive struggle for ratings and politicians cannot compete with entertainment programming in drawing the largest audiences. Second, by providing access to one candidate, the networks expose themselves to the provision of Section 315 of the Communications Act which requires equal access to all opposing candidates. Thus, the networks prefer to maintain greater control over their programming options by delaying the television campaign as long as possible.

Candidates, on the other hand, are anxious to get their messages across to the electorate early and often. Presidential campaigns tend to begin earlier than in the past. I suspect that the reason for this tends to be linked to the increasing number of primaries. A decade ago, there were 17 primary elections. In the year ahead, there will be 36. That fact, alone, changes the campaign timetable. The candidate's natural response is to seek more—and earlier—access to the electorate.

Since the Congress fashioned Section 312(a)(7) with a view toward ensuring that the public would be informed about candidates for federal office, I can only assume that it mandates greater, as opposed to lesser, access than would otherwise be available if the choice were left to broadcasters. As to when such access should become effective, I am particularly concerned that the networks have arrogated into themselves the determination as to when a presidential campaign should commence. Obviously, neither the networks nor this Commission has any authority, expressed or implied, to determine unilaterally the appropriate time for commencement of a presidential campaign. For this reason, I find that NBC and ABC have failed to demonstrate the reasonableness of their respective conclusions that it is "too early" to commence a presidential campaign.

The CBS Television Network has made the judgment ". . . that the public interest does not require the preemption of extensive segments of its national program service for political broadcasts of half-hour duration." This judgment is predicated on the "unusually large number of candidates" seeking presidential nominations and the likelihood that many hours of programming will be disrupted if equal time provisions apply. While CBS asserts that the claim that there will be relatively limited demand for network half hours for presidential candidates is a claim of speculation, I find the same speculation in the *assumption* by CBS that half-hour time periods would be sought by many presidential candidates. CBS Television Network has not demonstrated a factual basis for its presumptions.

Under the circumstances, the three television networks have been unreasonable in their refusals to honor the requests of the Carter-Mondale Presidential Committee.

APPENDIX C

FCC 79-773

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE COMPLAINT OF
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

against

THE ABC, CBS & NBC TELEVISION NETWORKS

MEMORANDUM OPINION AND ORDER

(Adopted: November 28, 1979;
Released: November 28, 1979)

BY THE COMMISSION: COMMISSIONER BROWN ISSUING A SEPARATE STATEMENT; COMMISSIONERS LEE AND WASHBURN DISSENTING AND ISSUING STATEMENTS; COMMISSIONER JONES DISSENTING.

1. The Commission has before it three Petitions for Reconsideration and for Stay of its *Memorandum Opinion and Order*, FCC 79-750, released on November 21, 1979, filed by the CBS, ABC, and NBC Television Networks. Our Order found that all three networks had failed to fulfill their Section 312(a)(7) (47 USC 312(a)(7)) obligations in that their responses to a request to purchase time by the Carter-Mondale Presidential Committee, Inc. (Committee) for use by President Carter in his capacity as a candidate for the Democratic nomination were unreasonable.

I. The Pleadings

2. *Petitions for Reconsideration.* The three networks claim that their actions in response to the Committee's

request were reasonable and that reconsideration should be granted. They state that they did in fact consider the needs of the candidate in reaching their decisions and that they also considered the nature and length of the campaign, the multiplicity of candidates and the possibility of programming disruptions. They argue that they have provided the public with extensive news coverage of President Carter and that the Commission's decision may run afoul of First Amendment considerations.

3. ABC and CBS both contend that the Commission has misconstrued the purpose of Section 312(a)(7) by focusing on the needs of individual candidates, as opposed to the needs of candidates in general in an overall campaign and that a standard that requires a broadcaster to weigh the purpose of a political program is contrary to the no-censorship provision of Section 315(a) (47 USC 315(a)). Additionally, CBS and NBC both argue that the draftsmen of the 1972 Amendments to the Communications Act intended to shorten the length of the campaign period and not extend it.[1]

4. CBS claims that its decision not to sell the requested time was "an editorial decision, no different from the decisions upheld by the Supreme Court in *Columbia Broadcasting System Inc.* v. *Democratic National Committee*, 412 US 94 (1973)"; that our decision "does violence" to the statutory purpose of Section 312(a)(7) since the legislation was designed to do no more than codify existing practice[2]; that the Commission has failed to "adequately explain" its decision in *Paul A. Talmey*, 49 FCC 2d 678

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[1] To support this argument, they cite *S. Rep.* 92-96 92nd Cong., 1st Sess. (1971). CBS also refers to the terms of the "lowest unit charge" provision.

[2] In this connection it cites *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 113-14 n.12 (CBS v. DNC).

(B/c. Bur. 1976); that the Commission lacks jurisdiction to require the networks to sell time under Section 312 (a) (7); and that it has considered the needs of the candidate. Specifically, it states that it considered: (1) the Committee's desire to purchase a half-hour of time and the fact that "the only special circumstance" alluded to in the Committee's original request for time was the date of the Iowa caucus; (2) that the first primary will not be held until February 26, 1980, and that during the pre-convention period the campaigns are focused on contests in individual states; (3) the fact that the convention is scheduled for August 11, 1980; (4) the importance of treating Democratic and Republican candidates equally; (5) that the President has not yet announced his candidacy; and (6) that his formal campaign will have "barely begun" at the time of the proposed broadcast.

5. CBS asserts that in addition to considering "the situation surrounding the candidates," it has also considered other factors which it believes justify its decision. In particular, it considered that there are a "large number of announced candidates"; that the cost of a half-hour prime time program ranges from $172-186,000; that in the 1976 primaries, 15 candidates qualified for a total of more than $24.1 million in Federal matching funds; that many candidates can thus afford to purchase time; that in the past minor candidates have purchased time[3]; that disruption of its prime time programming would "unreasonably" interfere with its overall service; that its owned and operated stations will receive many requests for time from local, federal and state candidates, which may cause further interruptions; and that its past practice has not been to sell half-hour segments this early in the campaign.

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[3] In this connection, CBS refers to its initial response where it stated that in the 1976 primary campaign Ellen McCormick and Eugene McCarthy purchased program time and that Mrs. McCormick brought four five-minute segments.

6. ABC argues that the Commission has substituted its judgment for the good faith judgment of broadcasters as to when the sale of political broadcast time must commence; that the Commission has acted contrary to its prior precedent in granting a candidate "standing" while conceding that the President is not presently qualified; that our ruling that Section 312(a)(7) applies to networks is "particularly suspect" in light of our acknowledgement of the lack of congressional guidance as to the purpose of the provision; that contrary to the Commission's interpretation of Section 312(a)(7) in our July, 1978 *Report and Order*,[4] we have "drastically lengthened media coverage of federal election campaigns." ABC further argues that in the last Presidential campaign it did not sell political program time until late April; that its decision to sell time as early as January was responsive to the requests that it was receiving from Presidential candidates; that these requests obviously reflected the individual needs of the candidates making them; that by rejecting other factors such as timing, multiplicity of candidates and programming disruptions, the Commission has "failed properly to assess and weigh overall public needs and interests"; and that news and public affairs coverage should not be a "controlling" factor in deciding when to begin political sales.

7. NBC asserts that it did in fact take into account, in its initial reply to the Committee's complaint, the "needs" of candidates for the office of the President in general and Mr. Carter's expressed needs and desires in specific in assessing the Committee's request[5]; that it

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[4] *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978) (*Report and Order*).

[5] In this connection, it cites page 6 of its initial comments where it stated "[a]s will be shown below, NBC has taken into consideration the factors specified by the Commission,

weighed these considerations against other "relevant" factors including timing, the multiplicity of candidates, and the possibility of programming disruptions; and that in light of this weighing process, it denied the request.

8. *Petitions for Stay.* All three networks assert that a stay is warranted in light of the fact that in the event that reconsideration is denied, they will seek judicial review of the decision. They further assert that the decision raises substantial legal questions. ABC and CBS contend that the judicial review process cannot be concluded by November 26, 1979, the date on which the networks must inform the Commission as to how they intend to comply with Section 312(a)(7), and that there is no need for them to take immediate action on the Committee's request since the President is not yet a legally qualified candidate. ABC and NBC claim that implementation of the Commission's decision threatens substantial disruption of their programming schedules during December. Additionally, NBC claims that judicial review of the Commission's decision would be "threatened by mootness" if the Petition for Stay is denied.

9. *Opposition to Petitions for Stay.* On November 23, 1979, an Opposition to Petitions for Stay was received from the Committee. It states that the "bare allegations" made in support of the requests for stay fall "woefully short of the standards followed by . . . [the FPC] for granting a stay as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958); that no showing has been made that CBS [6] is likely to prevail on the merits of its appeal; that CBS has not even alleged that it will suffer irreparable injury in the

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and its judgment based on these factors cannot be ruled unreasonable."

[6] The Committee states that the petitions of NBC and ABC are "similarly lacking in support."

absence of a stay; that the issuance of a stay would substantially harm the interests of the complainant; that CBS has made no showing that the public interest would be served by a stay; that the Committee's allegation that its interests would be substantially harmed by a stay is supported by the attached affidavit of Gerald M. Rafshoon which demonstrates that "substantial advance planning and arrangements are necessary to utilize the time period effectively in accord with the Committee's original plans. . ."; and that the networks had ample opportunity to litigate the constitutionality and application of Section 312(a)(7) in the Commission's July 1978 inquiry into its policy in enforcing that section.

10. *Opposition of National Citizens Committee for Broadcasting (NCCB) to Networks' Petitions for Stay.* An opposition to the Petitions for Stay was also received from the NCCB on November 23, 1979. NCCB asserts that the denial of a stay would "cause no harm to any of the networks and no such harm is even alleged." It further asserts that "the superior rights of the public to be exposed to information would be severely and irreparably harmed if the stay were granted.

11. *Opposition to Petitions and Requests for Reconsideration.* On November 24, 1979, the Committee filed an Opposition to Petitions and Requests for Reconsideration. The Committee asserts that the networks have raised no new arguments or facts that require the Commission to revisit its Order; that the petitions are essentially "*ex post facto* rationalizations of arbitrary prior decisions, fashioned to meet points raised during the Commission's . . . open meeting and in the MO&O"; that the networks' claims that they considered the needs of the candidate are "clearly unsupportable" in light of the facts already in the record; and that "[e]ven now the networks' refusals are not responsive to the factors described in the Commission's [July 1978, *Report and Order, supra.*]"

12. Citing CBS' claim that its refusal to sell the time is the type of "editorial decision" supported by the Supreme Court in *CBS* v. *DNC*, 412 US 94 (1973), the Committee asserts that the case has "no direct bearing on the application of Section 312(a)(7)" in that the case dealt with the Fairness Doctrine. It further asserts that the footnote in *CBS* v. *DNC*, *supra*, relied on by CBS is not "significant." As to CBS' contention that Congress expressed a desire to limit campaigns, the Committee points out that Congress rejected a proposal to limit the length of campaigns. The Committee argues that ABC's concern that the Commission has too deeply involved itself in determining when campaigns begin is "specious"; and that *Paul A. Talmey*, *supra*, which was cited by CBS is "not on point."

13. Regarding CBS' contention that the Commission lacks jurisdiction to apply Section 312(a)(7) to networks, the Committee claims that "it is inconceivable that Congress would have exempted [networks] from access obligations when it adopted Section 312(a)(7)." The Committee also addresses CBS' argument that Section 312(a)(7) violates the First Amendment and asserts that "[t]his argument fails to appreciate the fundamental fact that it is the public's First Amendment rights that are paramount."

14. *Reply to Opposition to Petitions for Stay.* A reply to Opposition to Petitions for Stay was received from CBS on November 26, 1979. CBS states that this case presents substantial questions; that it believes that it has "established a strong likelihood of prevailing on the merits"; that the Committee has failed to establish that it would suffer significant injury if a stay were granted; that CBS would suffer irreparable injury if a stay were not granted in view of the fact that the loss of First Amendment rights is "irremedial"; and that the public interest would "clearly" be injured if CBS were com-

pelled to sell program time to the Committee when the Congressional purpose [of Section 312(a)(7)] require[s] deference to CBS' editorial judgment.

15. *Petition for Reconsideration and Comments in Support of Motions for Stay.* On November 26, 1979, the National Association of Broadcasters (NAB) filed a Petition for Reconsideration and Comments in Support of Motions for Stay. It claims that the Commission's Order articulates a policy that bases a determination of "reasonable access" on the "needs" of particular Federal candidates; that under this policy licensees would be unable to exercise the discretion afforded to them by Congress; that the Commission asserts that networks act as "agents" for their affiliated stations; that in attempting to establish jurisdiction over the networks, the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees; that the Commission has established a new principle of "conditional candidacy"; that "[t]his decision means that henceforth every licensee must accept the claim of any person that he or she is about to become a candidate"; and that "[i]n reliance upon that claim, the Commission would require each licensee to sell at least thirty minutes of time per day to that individual."

Discussion

II. Legislative History

16. CBS argues that the legislative history of Section 312 shows that the legislation was "designed to do no more than codify existing practice" and cites *CBS* v. *DNC*, 412 U.S. at 113-14 n. 12 to support its argument. It also cites the Senate Report accompanying the bill containing Section 312(a)(7) and the terms of the "lowest unit charge" provision for the proposition that Congress intended to shorten the length of political campaigns.

17. We are not persuaded by CBS' argument that Section 312(a)(7) was merely meant to "codify existing practice." We considered and disposed of that argument in our July 1978 *Report and Order*, *supra*, where we stated that:

> We see no merit to the contention that Section 312 (a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. Moreover, Congress limited the applicability of the "reasonable access" provision to candidates for Federal elective office. The Commission's policy made no specific distinction between those candidates and candidates for state and local office. Therefore, it seems clear that Congress was creating a different, additional obligation which was to apply only to Federal candidates.

68 FCC 2d at 1088.

18. This interpretation is consistent with the intent of the drafters. CBS has presented no new or additional evidence that would warrant a departure from this construction of the statute. The only authority cited by CBS to support its argument is a footnote in *CBS* v. *DNC*, *supra.*, at 113-14 n. 12. Although we recognize that the Court's footnote states that Section 312(a)(7) "essentially codified the Commission's prior interpretation of § 315(a)," we do not believe that this statement should be controlling in a consideration of the legislative intent in enacting Section 312(a)(7). The footnote in question was merely a "laundry list" of the amendments to Section 315 that were adopted between 1934 and 1973. It appears that the statement in question was an attempt to summarize the terms of the "reasonable access" provision and was not meant to resolve the issue of whether Section 312(a)(7) was intended to impose new obligations

on broadcasters. That question was not before the Court; and the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it.[7] Thus, we find no reason to believe that our interpretation of Section 312(a)(7) as stated in our July 1978 *Report and Order, supra.*, was erroneous.

19. Our July 1978 *Report and Order, supra.*, also considered and disposed of the argument that the terms of the "lowest unit charge" provision and the Senate Report accompanying Section 312(a)(7) demonstrate that Congress intended to shorten the length of political campaigns. There we stated that:

> Although Congress may have wished to encourage candidates to concentrate their campaigning [on the 45 day period prior to a primary and 60 day period period prior to an election], there is nothing to indicate that it intended to *require* candidates to so limit their campaigns.

68 FCC 2d at 1091, n. 21.[8] In the absence of any new or additional information to the contrary, we continue to believe that Congress did not intend to *require* candidates to limit their campaigns to the 45 and 60 day periods and that it is quite possible that a presidential campaign may be in full swing a year before the election.

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[7] It is well-established that such interpretations are normally accorded substantial deference by reviewing courts. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[8] It is clear that we considered both authorities cited by the complainant herein. The Senate Report cited by CBS was quoted at page 1083 of the July, 1978, *Report and Order, supra.*, while the "lowest unit charge" provision was discussed at page 1091.

III. Commission Precedent

20. CBS contends in its petition that we have failed to "adequately explain" our "departure" from *Paul A. Talmey, supra.* The circumstances surrounding that decision differed substantially from those of the instant case. The *Talmey* case involved a Congressional race and not a presidential campaign. Moreover, the licensee there did agree to sell a half hour in prime-time and the gravamen of the complaint was that it had refused to sell a particular program length in a particular portion of prime time. For these reasons, we believe that the *Talmey* case is distinguishable on the facts and that it has little if any bearing on our consideration of the instant matter.

21. Regarding the Committee's failure, pursuant to Section 73.1940(a) to show that the President has qualified, ABC asserts that "in granting candidate 'standing' in this case . . . the Commission has acted contrary to prior practice and established a potentially troublesome precedent affecting its administration of all political broadcasting matters." [9] Our prior decision disposed of any argument relating to our past practices and we do not believe that it is necessary to reiterate our reasoning herein. As to the assertion that our decision will lead to future administrative problems, ABC has not identified

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[9] We note that the NAB argues that the portion of our ruling relating to the President's fulfillment of the requirements of Section 73.1940(a) means that we "would require each licensee to sell at least thirty minutes of time per day" to every person that claims that he is "about to become a candidate for Federal office." This statement ignores the clear language of our ruling which specifically states that "if the President is not a legally qualified candidate nationwide at the time of the broadast, the networks need not honor [his] request for time." Moreover, we never stated, or even implied, that "reasonable access" requires that any candidate be sold "at least thirty minutes of time per day."

specific problems and we believe that the benefits [10] to be gained by the approach followed in our ruling far outweigh any administrative burdens that may result.

IV. Jurisdictional and First Amendment Arguments

22. CBS claims that Section 312(a)(7) does not apply to networks and that the Section, as interpreted in this case, violates the First Amendment. However, CBS has presented no new or additional information to show that Section 312(a)(7) was not intended to apply to networks and we see no reason for reversing our ruling that the "reasonable access" provision applies to the networks. As explained in our previous order, that conclusion is consistent with the legislative intent in enacting Section 312(a)(7).

23. ABC contends in its pleading that the Commission's finding that the "reasonable access" provision applies to networks is "particularly suspect in light of both the plain language of the statutory provision and the Commission's prior acknowledgement of the absence of any meaningful congressional guidance as to the specific purpose of Section 312(a)(7)." We believe that our prior ruling fully considered and disposed of any argument that the language of Section 312(a)(7) indicates that it was not intended to apply to networks. We also believe

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[10] In our *Memorandum Opinion and Order* at 12, we noted that the delay that could result in the event that the networks could wait until the President had qualified before ruling on the request, might make it impossible for a candidate to obtain Commission relief in time to fulfill his plan of using his reasonable access rights promptly. We also noted that even if the networks were otherwise inclined to grant access, the last-minute scheduling disruption which would result from postponing the request and response until the legal qualification process was technically completed, might tend to discourage a grant of access.

that ABC's argument that the lack of congressional guidance renders our ruling "suspect" is without merit. Despite the fact that Congress gave us little guidance as to its intent in enacting the statute, the Commission still has a statutory obligation to enforce the provision and in that connection we must make judgments consistent with established interpretation of closely related provisions in Section 315.

24. The NAB also questions the propriety of that portion of our order that held that Section 312(a)(7) applies to networks. Citing our statement that "[i]n view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312(a)(7)," the NAB asserts that "the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees." It further asserts that "the Commission's enforcement of Section 312(a)(7), through the networks ignores the differing circumstances that are likely to exist at differing stations, such as the amounts of political time being sold by these stations locally to the same and other candidates."

25. The NAB has taken the above cited statement from our Order out of context, afforded it undue weight, and thus missed the essence of our ruling. Our ruling only held that a complaint addressed to a network would constitute a sufficient basis for a ruling in a Section 312(a)(7) matter in view of the considerable difficulties that a contrary ruling would present to presidential candidates seeking national access. In that connection, we noted that network licensees do, in fact, hold themselves out as a unit for sale of time generally and that it would thus appear that they would have little basis to argue that Section 312(a)(7) should not be applied to them as a unit.

26. Moreover, our ruling does not necessarily require any affiliate to broadcast political programming offered to it by the network. It would naturally be appropriate for each affiliate to consider its own particular situation, in the context of its own obligations to afford "reasonable access" pursuant to the statute, in determining whether to carry the network program.

27. As to CBS' assertions regarding the constitutionality of Section 312(a)(7), we refer to our July, 1978, *Report and Order, supra.*, where we refused to take a position on the constitutionality of the provision in light of our belief that:

> [S]uch issues are for the courts and Congress to resolve. The Commission's authority extends to the interpretations of statutes which Congress has enacted. [68 FCC 2d at 1094]

We believe that this is a sound, well reasoned approach and we therefore will continue to refrain from attempting to determine the constitutionality of the statute. Nevertheless, as we noted in Paragraph 35 of our *Memorandum Opinion and Order*, we recognize that our decision concerns First Amendment interests—both of the general public and broadcast journalists. We have, we believe interpreted the statute to effectuate the Congress' intent while not unnecessarily impinging on broadcasters' journalistic discretion.

V. Reasonable Access

28. ABC's argument that our ruling amounted to a substitution of our judgment for that of the licensee is not persuasive. Although we do afford deference to the licensee's discretion in "reasonable access" cases, the basic determination as to whether Section 312(a)(7) obligations have been satisfied must be made by the Commission. In reviewing ABC's response to the Carter-Mondale complaint, we concluded for reasons fully outlined in

the *Memorandum Opinion and Order* that ABC had been unreasonable in concluding that the campaign was not in full swing. In reviewing the ABC threshold determination that it was too early to sell time here, we evaluated both ABC's own assessment as well as the candidate's own showing in his complaint. Contrary to ABC's assertion, our decision as to the reasonableness of the timing of the candidate's segment was not based on the candidate's own appraisal of the status of the campaign. We did, however, find unreasonable ABC's position that the upcoming caucuses and primaries were merely of local, not national, significance. The Commission's determination on this threshold issue was based on its own independent evaluation of the status of the campaign taking into account the position of the candidate and the networks as well as other factors. *See* Paragraph 39 of the Memorandum Opinion and Order. We do not believe that such a determination by the Commission as to the threshold matter of timeliness of requests—based on both the broadcaster's and the candidate's perspective—impairs in any respect, or is inconsistent with affording deference to, broadcaster discretion. Neither broadcasters nor candidates bring a perspective of total objectivity as to questions of the initial applicability of Section 312(a)(7). Such questions may well have an inherently more objective character to them than other Section 312(a)(7) issues relating to amounts of time, scheduling or timing which arise after an initial determination on complaint that it is not too early for Section 312(a)(7) obligations to attach. Thus, we believe that a refusal on our part to make such basic determinations as to whether any rights attach under Section 312(a)(7) would amount to an abdication of our statutory obligation to ensure that licensees fulfill their Section 312(a)(7) responsibilities.

29. Our prior *Memorandum Opinion and Order* also stressed the significant role that the needs and desires

of the particular candidate must play in evaluating "reasonable access" requests. While recognizing that this factor was not paramount, we stated that:

> A Federal candidate's decision as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee.

Memorandum Opinion and Order, supra., at page 14 *quoting Report and Order, supra* at 1090.[11] In light of the networks' apparent failure to give any consideration to the candidate's needs and desires, we concluded that they had failed to fulfill their Section 312(a)(7) obligations.

30. Despite the clear mandate of our decision, CBS now argues that "Section 312 was designed to apply equally to candidates similarly siguated, and the desire of one particular candidate to present his views in a particular format should not affect the reasonableness of a licensee's determination that it is too early in the campaign to begin selling time. . . ." We believe that our discussion above fully disposes of CBS' contention that it was reasonable for it to conclude that it was "too early" in the campaign to begin political sales. As to CBS' contention that Section 312 was designed to apply equally to candidates similarly situated, we also reject that notion to the extent that it implies that broadcasters need not consider the merits of each individual request with which they are presented. However, we do recognize that our original Order may not have fully explained the manner in which we expect licensees to weigh individual requests for reasonable access. In light of the importance of this issue, we will take this opportunity to clarify that aspect of our Order.

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[11] Similar references to candidates' needs appear in the *Report and Order, supra.*, n.14 at 1089 and ¶ 40 at 1090.

31. In carrying out their Section 312(a)(7) obligations, we expect that the broadcaster will weigh each request in its own specific context on a particularized basis. Thus, we expect that, in weighing considerations countervailing to the particular request, the broadcaster will not rely on merely generalized assertions about the number of potential multiple requests for time but will attempt to appraise their actual likelihood at each stage of a campaign. In this connection, we think it entirely appropriate that the broadcaster contact the candidates at the outset and at various stages during the campaign to determine the probability of access requests by such candidates.

32. We wish, moreover, to clarify how a broadcaster might evaluate individual candidate requests. For example, we do believe that a broadcaster can reasonably consider such factors as the number, individual lengths, total time, and timing of access opportunities previously made available to a particular candidate. While we certainly do not wish to encourage broadcasters to limit arbitrarily the amount of time available to any one candidate, we do believe that, in acting on access requests, the broadcaster may take account of the number of "uses" previously obtained by a particular candidate.[12] Thus, if a candidate has had numerous recent access opportunities on a particular station or network, we believe that the station or network might be less accommodating in offering time than it might be in the case of a candidate who had not previously purchased any time. Conversely, at the beginning of a campaign when a can-

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[12] For reasons outlined herein we do not believe that broadcasters may reasonably consider the amount of coverage afforded to a candidate in programming exempt from Section 315. See para. 38. Section 312(a)(7), like Section 315(a), contemplates "use" by the candidate; news coverage is no substitute for such "uses."

didate has not previously made any requests for time, no such weighing of an individual candidate's other access opportunities can be undertaken; and necessarily in this respect the candidate's initial request of a campaign carries an air of reasonableness to it. Indeed, we specifically note, and rely on the fact that the case before us involves just such an initial request for time.

33. In addition, on reconsideration, we believe that we should more precisely delineate how the specific nature or purpose of a particular candidate's request should be weighed. We specifically eschew any intention of requiring broadcasters to make an assessment of individual candidate "needs" insofar as they solely relate to the candidate's subjective, personal, or immediate "political" desires. We do not intend to place broadcasters in the position of evaluating the "political" importance or urgency of individual candidate needs in terms of a particular candidate's situation in a campaign, e.g., where he stands in the polls or how he has fared in specific primaries. However, we have specifically noted that a broadcaster should not "second guess" the "political" wisdom or relative audience-attracting effectiveness of longer versus shorter formats in determining the "reasonableness" of a candidate's request. Such judgments, we concluded in our 1978 *Report and Order*, are best left to the discretion of the candidate and his media adviser. 68 FCC 2d at 1089 n. 14. Moreover, we shall look with concern upon evidence that broadcasters have not demonstrated proper restraint in evaluating the candidate's request. As noted below, CBS apparently seems to have evaluated the particular request before it in this improper manner.[13] *See* Para. 50 below.

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[13] CBS' statements indicate that it has simply substituted its political judgment for that of the candidate and his media adviser. *See* its Petition at 4-6 reciting the needs considered. Since, however, CBS apparently concluded it was "reasonable"

34. We recognize, of course, that the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate. Other public interest factors, such as the disruption or displacement of regular programming (particularly as affected by a reasonable probability of requests by other candidates), must be considered in the balance. In this overall weighing process, we nevertheless believe that a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime. For example, a candidate might request an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests. In our view Section 312(a)(7)'s goal of encouraging electorate-informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request. In this case, we found in our original *Memorandum Opinion and Order* and have reaffirmed on reconsideration that CBS made no effort to explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request. CBS provided no explanation as to how two such short segments could afford enough time for a discussion

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to sell five-minute slots, its explanation apparently goes to the "wisdom" of the candidate's need for longer blocks of time. It notes, for example, that the average audience for five-minute segments is higher than that for thirty-minute segments. Likewise, its extended discussion of the early stage of the campaign implies, in view of its decision to sell *some* time, its own independent judgment of the effectiveness of buying at this time *longer* segments of time. Such an approach by CBS seems squarely inconsistent with its obligation to honor "as much as possible" a candidate's decision as to "the best method of pursuing his media campaign."

of subjects as broad as those the candidate intends to discuss. Similarly, ABC's decision not to make any time available for sale to presidential candidates before January 1980 was unresponsive to the candidate's expressed purpose of using the broadcast time near the time of his announcement of candidacy in December to make a comprehensive statement of the candidate's position and record which "could not be accomplished later." In this general respect, we believe that consideration of the nature and purpose of the individual candidate's request—and, in that sense, of his needs—is appropriate and indeed consistent with the goals of Section 312(a)(7).

35. Finally, in emphasizing that a broadcaster should take into account the individual request of each candidate not just "candidate needs" in general, we do not mean to suggest that the latter factor is an improper or irrelevant one for the broadcaster to consider. We have simply found that it was unreasonable only to consider candidate needs generally and to ignore the individual candidate's needs and requests in applying Section 312(a)(7).

36. Although CBS argues that "[i]n any event, [it] has considered the needs of the candidate," we cannot find that it has presented sufficient evidence to warrant a reversal of our ruling. The factors that CBS has allegedly considered are: (1) the Committee's desire to purchase a half hour of time; (2) the date of the Iowa caucus; (3) the average audience for five-minute political programs in the last decade was 67% greater than the audience for half-hour programs; (4) the nature and length of the presidential election process; (5) the importance of treating all candidates equally; and (6) the fact that the President's campaign will have barely begun at the time of the broadcast. CBS states that consideration has also been given to the "large number" of candidates; that many candidates can afford to buy time;

that the sale of the requested program would "unreasonably interfere with its overall service"; and that its past practice has not been to sell half-hour segments this early in the campaign. Thus, CBS essentially reiterates the three arguments relating to timing, multiplicity of candidates, and programming disruptions that it made in its original comments.[14] For the reasons stated in our Order, we believe that its explanation for refusing the candidate's request was not reasonable.

37. Two remaining points raised by CBS are worthy of comment. First, CBS states that it was not appropriate for it to consider the contents of the proffered program. We recognize that we have long held that Section 315(a) prohibits a licensee from reviewing the contents of a candidate's broadcast on any basis relating to censorship.[15] We believe that our ruling in the instant matter is in no way contrary to this policy. Our ruling only states that due consideration must be given to the nature of the candidate's *request* and the *purpose* of the program as described in the request. We never directed any licensee to review the contents of any program; nor did we state that the contents of any program would be a relevant consideration in evaluating a request for reasonable access.

38. CBS also states that President Carter has had a "substantial opportunity for the presentation of his views" on the CBS Television Network in that it has

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[14] In essence, CBS attempts to provide a *post hoc* explanation for its original refusal of the candidate's request. In this respect, it simply attempts to recast reasons previously provided and to show that, in weighing factors such as timing and programming disruptions, it was in fact evaluating the candidate's needs.

[15] *Law of Political Broadcasting and Cablecasting*, 69 FCC 2d at 2209, 2269-71.

broadcast four presidential addresses and that he has made 52 appearances on news programs. To the extent that this argument implies that Section 312(a)(7) obligations may be fulfilled through the broadcast of programming which is exempt from Section 315, it is contrary to the interpretation that we gave to Section 312 (a)(7) in our July 1978, *Report and Order*, *supra*. There we concluded that Section 312(a)(7) would be rendered meaningless were we to interpret it to mean that the obligation to afford access could be satisfied by the type of news programming that is exempt from Section 315 considerations. Thus, the fact that the President may have appeared on exempt news programming is not relevant to our determination of this matter.

39. In its Petition for Reconsideration, ABC simply asserts, as do the other networks, that the Commission has relied on an improper standard by requiring individual candidates' needs to be weighed. Because we believe this to be the proper standard for reasons outlined in the *Memorandum Opinion and Order*, *supra.*, and in paragraphs 31-35 above, and because ABC has apparently not considered such needs, we reaffirm our conclusion that ABC's reasons for refusing to provide the requested time were unreasonable.[16] We likewise find that the other

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[16] In this case, ABC has not alleged that it considered the individual candidate's request or the purpose of the proffered program. ABC only states that its decision to start selling time as early as January 1, 1980, was responsive to the requests received and that these requests "obviously reflected the individual needs of the candidates making them." It would therefore appear that ABC considered all of the requests as a group in setting its policy. Thus, it apparently considered only candidate needs in general; and no consideration was given to the particular nature of each specific request. *See* paragraphs 31-35 above for a full explanation of the deficiency of this approach.

contentions raised by ABC have no merit.[17]

40. NBC also essentially argues that it considered President Carter's "expressed 'needs' and 'desires' as to the method of conducting his . . . media campaign" and weighed these considerations against other relevant factors including the timing of the broadcast relative to the overall nomination, the possibility of programming disruptions, the multiplicity of candidates and the "extensive coverage" afforded to the President in news programming. For the reasons fully explained in our ruling, and the foregoing discussion in Paragraph 28 herein, we do not believe that it was reasonable for NBC to conclude that the "timing" of the broadcast relative to the

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[17] We also note that ABC's Petition for Reconsideration improperly characterizes our decision as holding that the needs of the candidate are the only consideration in applying Section 312(a)(7). While we believe that the needs of a candidate constitute a significant factor and are entitled to significant weight, we recognize that other factors are relevant in making reasonable access determinations. *See* paragraphs 31-35 above and 42-52 below. ABC argues in addition that our ruling is contrary to our July 1978 *Report and Order, supra.*, in that it "drastically" lengthens political campaigns. This argument is contrary to the plain language of the July 1978 *Report and Order, supra.* Although we stated there that "reasonable access" obligations would attach at least during the periods when the "lowest unit charge" provision is applicable, we never stated that the operation of Section 312(a)(7) would be *limited* to those periods. Rather, we clearly explained that cases involving requests made prior to those periods would be decided on a case-by-case basis and we recognized that a presidential campaign may be in full swing even a year before the election. ABC also implies that our ruling "suggest[s] that news and public affairs coverage of the campaign is a controlling factor in deciding when to begin political sales." However, our ruling unambiguously holds to the contrary. *Memorandum Opinion and Order, supra.*, at 18 n.26.

convention was such that the denial of the request was warranted; nor do we believe that it was reasonable for NBC to determine that such a multiplicity of candidates [18] existed that its refusal to afford the time was justified. Furthermore, our ruling fully disposed of the contention that the possibility of programming disruptions in this case was so real and substantial that it was not necessary to honor the request. Moreover, as stated in our discussion of CBS' Petition for Reconsideration, we do not believe that news coverage of the President's activities is relevant to an evaluation of a "reasonable access" request.

41. Thus, we cannot find that any of the factors that NBC "weighed" against the needs of the candidate are persuasive. Neither NBC's original response nor its Petition articulate any adequate basis for its decision. In particular, in its Petition, NBC merely asserts in conclusory terms it has weighed all relevant factors; [19] but it has totally failed to articulate how it reached its result. We cannot uphold as reasonable a judgment which is so lacking in explanation.[20] Accordingly, the Commission still cannot find that NBC has acted reasonably.

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[18] We recognize that NBC also asserts that "the requirements of Section 315" was a factor employed in its weighing process. However, it would appear that this factor is just part and parcel of the multiplicity of candidates argument which we considered fully in our *Memorandum Opinion and Order, supra.*, at 20 n.29.

[19] Like ABC and CBS, NBC essentially contests the Commission's reliance on any standard which requires an evaluation of individual candidate needs.

[20] *See Greater Boston Television Corp.* v. *FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).

V. Summary

42. In conclusion, then, we reiterate the basis for our original decision and our decision here on reconsideration. Section 312(a)(7) involves a delicate balancing of competing First Amendment related concerns—assuring the independence of journalistic discretion, affording increased opportunities for political discussion and "uses" of broadcast time by candidates, and informing the electorate on issues of public importance. Neither the statute nor its legislative history afford the Commission with precise guidance on how to accommodate these potentially conflicting concerns.

43. We believe that Section 312(a)(7) cannot, however, be implemented reasonably if either the interests of broadcasters or candidates are allowed to become preeminent. For, if we accord controlling weight to candidate's needs and interests, there is a serious potential for impinging unduly on broadcaster discretion. At the same time, if we interpret the statute so as to afford broadcasters essentially unlimited discretion with respect to access issues, the needs of candidates and of the electorate may be given short shrift. This would be contrary to what we believe was the Congress' clear intent in adopting Section 312(a)(7) to safeguard those vital interests.

44. Thus, we believe that essential to enforcement of Section 312(a)(7) are the dual notions of deference to broadcaster discretion and broadcaster accountability. Such accountability implies that the Commission must review the exercise of broadcaster discretion and find unreasonable decision which fail to effectuate the purpose of Section 312(a)(7). However, deference to broadcaster judgment implies that in carrying out our responsibilities under Section 312(a)(7) we will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments under Section 312(a)(7).

45. In implementing Section 312(a)(7), we have shied away in the past from prescribing specific guidelines. *Report and Order, supra.*, 68 FCC 2d at 1089. We concluded, however, in our July 1978 *Report and Order* that we could specify some of the relevant criteria that should be evaluated in making judgments under the statute. The various criteria of timing, multiplicity of candidates and the needs of the candidates have been fully discussed in our original Order and here on reconsideration. Most of these factors relate primarily to broadcasters' needs. By requiring consideration of the needs of the candidates, we have required broadcasters to weigh a countervailing factor in the balance. We have not prescribed exactly what weight this factor has among the others except as noted before, the candidate's decision as to "the best method of pursuing his media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee." *Report and Order, supra.*, 68 FCC 2d at 1090. Thus, a broadcaster continues to have substantial leeway as to the amount, timing, and scheduling of "uses of airtime by a candidate."

46. By requiring that individual needs be considered in such a manner as set forth in paragraphs 31-35 above, we do not, of course, intend broadcasters to evaluate or censor the individual program since such conduct is foreclosed by Section 315. We do expect, however, that broadcasters will consider the particular nature of the request made so that "as much as possible" and "within reasonable limits" airtime will be responsive to the candidate's needs. We are concerned however, about merely "blanket determinations", such as appear to have been made here, of candidate's needs in general. Such a standard could too easily allow decisions based on broadcaster's own convenience or economic interest to be couched in terms of amorphously defined candidate needs. We note as an example of that, ABC's attempt here to justify its flat

refusal to offer time until January 1, 1980. See paragraph 39, n. 14 above. Requiring a specific—rather than blanket—response to individual requests provides greater assurance, we believe, that candidate's interests cannot be ignored in the balancing process.

47. We have attempted to implement Section 312(a)(7) by requiring, in response to a complaint, a full explanation of a broadcaster's decision. Requiring a full explanation is, moreover, essential to assuring that we do give careful consideration, and appropriate deference, to a broadcaster's discretion.[21] We must deal essentially with the broadcaster's own reasoning—not generally with resons we might have relied on. Beginning our analysis with the broadcaster's reasons and according them deference is not the same as considering that judgment unreviewable. It means we are confined in the process

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[21] As we noted in our discussion herein, we also believe that threshold questions as to when Section 312(a)(7) rights and obligations attach are susceptible to more "objective" analysis than decisions about amounts of time and scheduling. In that area, as we noted above, we have weighed both the complainant's and the broadcaster's showings; and we have tried to identify some independent indicia as to whether a campaign is underway and, therefore, it is not premature for Section 312(a)(7) to apply. We do not regard this as an unreasonable way of resolving this threshold matter; and we do not regard our original *Memorandum Opinion and Order* as substantially impairing broadcaster discretion any more than had we determined in our 1978 *Report and Order, supra.*, to establish some prescribed period for Section 312(a)(7) access. There, we concluded that any such fixed period for applying Section 312(a)(7) would not take into account differences among individual campaigns or among Presidential and other elections for federal offices. Indeed, we specifically anticipated there that Presidential campaigns could begin as much as a year before the general election. *1978 Report and Order, supra.*, 68 FCC 2d at 1091.

of review by the broadcaster's own reasoning. But in like measure it means that the broadcaster is confined by his own explanation. The reasonableness of his conduct must stand or fall on his own analysis.

48. It has been within this framework that we have approached our review of the three networks' responses to the Carter-Mondale complaint. In our original Order, and now on reconsideration, we have reaffirmed that each of the three networks has failed to consider one of the relevant factors, individual candidate needs, under Section 312(a)(7). Each of the networks fundamentally contests our reliance on this standard adopted in our 1978 *Report and Order*. We have twice now rejected their contentions and have found, therefore, their determinations based on an improper standard to be unreasonable.

49. At least one of the networks, NBC, while disputing the reasonableness of the individual needs test, asserts on reconsideration that it has evaluated this and other factors. We have rejected this conclusory assertion essentially on the ground that NBC has merely recited relevant factors without any explanation of how it applied those factors in this case. CBS has also disputed the relevance of the individual candidate needs test; yet it has discussed the "needs of a candidate." We find its explanation on this point unreasonable and arbitrary. For in spite of its apparent conclusion that it was not too early to sell five-minute slots to the candidate, CBS appears to assert it is too early or somehow unwise for the candidate to purchase a longer time period. Based on our review of CBS' own explanation of its position, we do not believe its decision reflects a good faith attempt to consider as much as possible the candidate's decisions about his own media strategy. *See* paragraph 33 above.

50. In our original Memorandum Opinion and Order, we found and now reaffirm that it is not premature for

Section 312(a)(7) rights and obligations attach. As to the two networks that concluded not to sell any time, we reaffirm that their determination that the campaign was not underway is unreasonable. NBC has apparently adopted no general policy, but is simply refusing to sell time at this point. ABC appears to have adopted a blanket policy of refusing to sell time to presidential candidates until January 1980, which, in view of our determination about the state of the campaign is unreasonable. This policy, moreover, precludes the consideration of individual requests on the ground that the network is obliged only to consider the "general needs" of candidates—not the needs reflected in any particular candidate's request to purchase time. For reasons outlined above, we believe that such a policy is unreasonable.

51. We have further concluded that all three networks claims of multiple candidate requests are an unreasonable basis at this time for refusing to sell time to the candidate. We concluded that, in spite of the theoretically large number of candidate requests, not all candidates appear likely to request time in response to the candidate's request here. Moreover, not all candidates are likely to request time on each of the networks. And none of the networks have here asserted that there are other—or contingent—requests for half-hour purchases now pending before them. Thus, the claims of disruption of scheduling and multiple requests are speculative and unsubstantiated at best. Furthermore, the candidate here has taken steps to minimize the potential for last minute disruptions by requesting time two months in advance. The alleged disruption involves programming, moreover, which by its general nature informs the electorate on issues of public importance. Weighed against these speculative claims of injury is the networks' clear and admitted refusal to offer time responsive to the individual candidate's request. The candidate here had made no previous requests for time, and his request specified a

format permitting more extended exposition than possible in a five-minute request. In view of these facts and the merely speculative likelihood of multiple requests and after weighing all these factors, we believe that we must find that the networks have acted unreasonably in carrying out their obligations under Section 312(a)(7). In view of the foregoing, all of the petitions for reconsideration are denied.

VII. Petitions For Stay

52. Each of the networks has also requested a stay of the November 21, 1979, order pending reconsideration and, if reconsideration is denied, pending judicial review. The Carter-Mondale Committee and NCCB have opposed the stay requests. For the reasons set forth below, we find no basis to stay the requirement of the November 21 Order, as amended by our action today, pending judicial review.[22]

53. The Commission has adopted generally the same standards for considering stay motions as employed by the courts in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1959), and *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). *See, e.g., Cable TV Pole Attachment Regulations*, 73 FCC 2d 1 (1979). These standards basically involve an assessment of whether the movant has made a substantial case on the merits in light of a balancing of the equities revealed in showings of irreparable injury, harm to the public and harm to others in the absence of a stay.

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[22] Insofar as we have established November 29, 1979, as the date for the networks to demonstrate the steps that they intend to take to fulfill their Section 312(a)(7) obligations (see Paragraph 59 below) we are only in this limited respect modifying our November 21 Order.

54. In this situation, the equities weigh overwhelmingly against granting a stay. CBS has made no effort to demonstrate any injury, irreparable or otherwise, which it would face in the absence of a stay. ABC and NBC merely rely on vague and generalized references to program disruption. It is clear that none of the networks would suffer any injury if the stay is not granted.[23]

55. On the other hand, the Cater-Mondale Committee has made a substantial showing that it would be harmed if the Commission were to stay its action. The Committee explains in its Opposition and in an accompanying affidavit of Gerald M. Rafshoon, who is responsible for the production and placement of advertising for the Committee, that the requests, which were made nearly two months in advance of the broadcast dates requested planned to have the broadcast coincide as closely as possible with the President's formal announcement of candidacy on December 4, that that announcement cannot be postponed, and that substantial advance planning is necessary to utilize the time period effectively. Mr. Rafshoon's affidavit states:

> [T]he purpose of the program in question is to inaugurate, and set the tone for, the official and formally announced portion of the President's campaign by describing the record of his Administration and the case for a second term in a thoughtful and complete manner. Thus, to achieve its central purpose, it must appear as close as possible to the President's planned announcement of candidacy on December 4, 1979. At least one week's lead time is required to

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[23] NCCB points out that "[n]ews events of many kinds, sports programs and many of [the networks'] own special entertainment programs disrupt schedules", and we agree with NCCB's conclusion that the alleged harm "is neither serious nor irreparable, especially where paid programming is involved."

promote this program properly in order to inform the public of its showing and to assure an adequate viewing audience.

The affidavit also points out that since early October, the Committee has been recruiting individuals across the country to hold small fund raisers in their homes during the week of the announcement with the "key" to the planning and promotion of these events being the presentation of the program for which time has been sought. It is the Committee's intention to have 2,000 homes participating in these events and that it would be impossible to implement this program successfully if the television time is not available. The Committee has made a substantial showing that it would be harmed irreparably if our Order were stayed.

56. Moreover, the clear policy of Section 312(a)(7) is that the public interest is served by ensuring that voters have access to candidate's messages through broadcast stations. In this regard, there would certainly be some harm to the public if the networks' stay requests were granted.

57. Since the equities balance so heavily against granting a stay, a very strong showing on the merits would be required to justify granting the motions. The networks have not presented a sufficiently compelling case on the merits to override the strong weighing of equities in favor of denying the requests for a stay. We recognize that this is an important decision, that it reflects the first occasion in which the Commission has considered when Section 312(a)(7)'s obligations attach in presidential campaigns, and that Section 312(a)(7) has never been subjected to judicial review. However, none of these factors reduces the networks' burden to present a very strong case on the merits to overcome the substantial equities militating against grant of a stay. The discussion at paragraphs 16-52 above makes clear our con-

clusion that the networks have fallen far short of presenting such a substantial case. The requests for stay are therefore denied.

VIII. Conclusion

58. The three networks have now had two opportunities to justify their refusal to offer the requested time. Continued delay by them threatens to moot the candidate's complaint now before us. Our standards in this area were made explicit in our 1978 *Report and Order, supra.*, and in our *Memorandum Opinion and Order.* We recognize that the three networks intended to seek immediate judicial review of our decision denying reconsideration and stay. If a judicial stay is not obtained, we will expect that they will forthwith meet their Section 312(a)(7) obligations. We instruct them to inform us by the close of business November 29, 1979, of how they intend to meet their Section 312(a)(7) obligations. In assessing that response we will be obliged to consider the extent to which their conduct reflects a further failure to meet obligations which have been substantially and clearly defined. We shall then decide what, if any, specific measures may be required to remedy any continued failure to comply with Section 312(a)(7).

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

SEPARATE STATEMENT OF COMMISSIONER TYRONE BROWN

I voted with and joined in the opinion of the Commission majority which found that in this case the three commercial television networks have not met their "reasonable access" obligations under Section 312(a)(7). I now vote to deny reconsideration, although I believe it has been beneficial that the petitions for reconsideration

have given the Commission this opportunity to amplify its original *Order*.

I.

The pleadings of the networks in support of reconsideration suggested to me that they have misconstrued the intent of the original *Order* because language therein could be interpreted as giving total control to the candidates on the questions of whether and when they would receive broadcast time under Section 312(a)(7). The *Order* we issue today makes it clear that we do not intend, through our subjective processes, to second guess broadcasters' subjective assessments of political candidates' subjective determinations of their own needs. Rather, we are only requiring broadcasters to fairly balance their interests against the needs and desires of the candidates in responding to particular requests for access.

The expanded discussion in today's *Order*, describing some of the factors broadcasters reasonably can take into account, and emphasizing the irrelevancy of the candidate's subjective views of why he or she needs the time, helps to clear up any confusion about the Commission's intent. Ultimately, because cases such as this one turn on their particular facts, I have been concerned that we not reach beyond the facts before us to make general pronouncements which may not withstand the test of time. I believe we have now avoided that temptation.

I recognize that the positions of CBS and ABC have surface appeal. Responding to the Carter-Mondale Committee request for a 30-minute prime time availability on one of four specified days in early December, ABC offered an indefinite amount of program time in January and CBS offered two five-minute segments—one during prime time—on any one of the requested December dates. Nonetheless, in my judgment, in addition to NBC's "un-

reasonableness" [1] in failing to make any time available, the responses of CBS and ABC were unreasonable within the intendment of the statute.

Our *Orders* properly focus initially on the argument of ABC and NBC that, given the mid-August 1980 date of the Democratic National Convention, an early December 1979 date is too soon for the reasonable access provision to come into play. The fallacy in the networks' argument is that they fail to recognize that, at least after enactment of Section 312(a)(7),[2] such a determination is left neither to the sole judgment of the broadcaster nor to the sole judgment of the candidate.

There are *objective* indicia of when a political campaign—from the perspective of the electorate—is actively underway. Undisputed facts set forth in the Commission's original *Order*, at paragraph 39, fully support our conclusion that the 1980 Democratic presidential nomination campaign is sufficiently underway to trigger application of Section 312(a)(7). In this regard, I consider it particularly relevant that the formal process leading to selection of delegated to the Convention has begun in Florida and will begin in Iowa on January 21. Both of these events have captured substantial national attention (*Order*, par. 39 & n. 21); they are part of the continuum of formal steps leading to the Convention it-

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[1] It is unfortunate that judgments made by the networks in this case must be characterized as either "reasonable" or "unreasonable." In this connection, see my response to Commissioner Jones' dissenting opinion below.

[2] This case involves interpretations of a statute whose only direct beneficiaries are candidates for Federal elective offices. The Commission properly has not considered whether its holding extends to candidates for non-Federal offices under the general public interest standard.

self. The Commission did not create this factual situation, but neither we nor the networks can ignore it.

I attach particular significance to the ongoing nature of the formal delegate selection process, and to the extent of national focus on that process, because these are relatively objective measures of whether the presidential nomination campaign is sufficiently underway to implicate Section 312(a)(7). Considering these objective factors and the others cited in the original Commission *Order*, we clearly were correct in our holding on the timing issue.

As I read that part of our original decision, we have not given undue weight to subjective judgments of the candidates. To the contrary, we have held only that subjective judgments by the networks that it is "too early" to permit paid political programs cannot prevail in the face of unmistakable objective indicia that the campaign is in fact well underway.

Our holding that the 1980 Democratic nomination campaign is actively underway also goes a long way toward resolving the issue of the reasonableness of the ABC and CBS responses to the Carter-Mondale Committee. CBS argues not that December is too early for paid political programs, but that December is too early for such programs of greater than five minutes' duration. Phrased most favorably to the networks, CBS argues that, balancing all relevant factors, its decision to offer five-minute program slots in response to the request of the Carter-Mondale Committee discharged its obligation under Section 312(a)(7). Apparently, as Convention time nears, CBS will be prepared to permit purchase of longer segments of time.

In what respect, if any, is the CBS response unreasonable? In the first place, as the Commission's original *Order*, at paragraph 31, indicates, just last year we

stated unanimously that "an arbitrary 'blanket' ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable." 68 FCC 2d at 1090 (1978). In the second place, as that *Order* also recognizes, this general principle gives us guidance not answers. For answers, we must analyze the facts.

For me, in addition to the factors discussed in our *Orders*, one overriding fact that begs for attention in the negotiation between CBS and the Carter-Mondale Committee is that the request for broadcast time at issue represents the Committee's *first* request to the networks for a substantial segment of program time. If Section 312(a)(7) has any meaning at all, it must mean that, once a campaign is actively underway, and reasonable access rights have attached, broadcasters must be responsive to the *first* request for a substantial segment of program time on behalf of a candidacy, unless there are compelling reasons for not honoring the request.

To respond appropriately to a request for paid time under Section 312(a)(7), the broadcaster must weigh, on one hand, the factors that favor a positive response and, on the other hand, those that mitigate against such a response. However, normally, as in this case, when the broadcaster is presented with a timely *first* request, there will be few (if any) valid reasons (such as multiplicity of recent requests by the same candidate, or the lateness of the request, or the *actuality* of a host of requests from many candidates) to deny the *first* request. I would expect the equities to favor granting access.

Here, neither in its original pleadings nor in its Petition for Reconsideration has CBS cited compelling reasons for not honoring this first Carter-Mondale Committee request for 30 minutes of program time. Similarly, in declining to afford program time until January, ABC was unresponsive to a first request of the Carter-Mondale

Committee for a substantial segment of program time. ABC provides no compelling reason to justify its rejection of the request. On these facts, the Commission has no choice but to find that the ABC response, like the CBS response, was unreasonable.

II.

Commissioner Jones dissented from our original *Order* on the ground that we should not overturn the judgments of the networks, absent "a clear showing" that they have acted unreasonably. I read in Commissioner Jones' statement a conviction that this is a very close case and, in the interest of broadcaster discretion, close cases should be resolved in favor of the broadcaster.

I agree with Commissioner Jones that, if we must err in resolving close *factual* questions under Section 312(a)(7), it should be on the side of broadcaster discretion. However, the issues that here sharply divide the Commission are more legal than factual.

In our original *Order*, the principal issue was whether, and to what extent, broadcasters must address each candidate's particular request rather than taking a blanket approach in responding to reasonable access requests. These are preeminently legal issues; they involve legal interpretation of Section 312(a)(7). Under the additional approach I have suggested herein, the issue is whether broadcasters, without compelling reasons, may deny a first request for a substantial segment of broadcast time after the campaign, as an objective matter, is actively underway. This issue also is a legal interpretive one. And, even the issue of how to determine objectively whether a campaign is actively in progress is a mixed one of law and fact.

Resolution of legal issues, particularly when we must attempt to strike a delicate balance among important

competing interests, often involves very close calls. Congress assigned to this Commission the role of initially making the legal judgments necessary to fill in the details of Section 312(a)(7). We should not surrender this interpretive role in the name of broadcaster discretion.

Were we here considering a situation in which a candidate (having obtained broadcast time reasonably responsive to the first request) was seeking additional time, I would in a close case be prepared to consider arguments about broadcaster discretion. I fail to see how an unresponsive reaction to a *first* request for broadcast time (when, as here, there is nothing concrete and substantial to weigh on the broadcaster's side of the scale) can be said to comply with the requirement of reasonable access.

III.

The networks argue that the potential for "disruption of [their] program service" [3] was a factor which weighed heavily in their decisions to refuse the Carter-Mondale Committee's request. They based the likelihood of disruption on speculation as to the number of candidates who would seek time if the Carter-Mondale Committee's request were granted. This concern was recognized in the Commission's original *Order* in this case,[4] where we addressed the argument and refused to accede to the networks' view. I consider our response to be sound, and I hold to our conclusion that mere speculation about programming disruption cannot justify the networks' negative responses.

I note, for example, that in its Petition for Reconsideration, NBC states that:

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[3] CBS Inc. Petition for Reconsideration at 9; NBC Petition for Reconsideration at 4 note * ; Petition for Reconsideration of American Broadcasting Companies, Inc. at 10.

[4] *Order* at pars. 42-44.

> "[A] candidate may obtain Section 315 time and then seek time of his own under the reasonable access requirements of Section 312(a)(7). Given the weight the Commission would seem to attach to a candidate's own 'needs' and 'desires,' it might prove improper to decline to honor such request; the grant of such time would, of course, set in motion an entirely new round of equal time requests." [5]

We specifically addressed this concern in our original *Order*, indicating that NBC's concern is not a valid one.[6] There we recognized the interplay of Sections 312(a)(7) and 315 and we emphasized our ability and willingness to interpret and apply those provisions in a practical and equitable manner in order to avoid programming disruptions contrary to the public interest.

Other Commission procedures may alleviate the networks' concern in this regard. For example, a network facing practical problems complying with "access" or "equal opportunities" requests might apply to the Commission for a waiver of the Prime Time Access Rule to permit the broadcast of political programming during the "access" period. Without passing on the merits of such a request in the abstract, I believe the foregoing demonstrates that the Commission possesses adequate means to respond in a practical way to valid concerns of the networks over program disruption.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

"Quo Vadis"

I have listened carefully to my colleagues explain how this decision leaves broadcast discretion with the networks. However, the decision doesn't have this effect. By

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[5] NBC Petition for Reconsideration at 5, note *.

[6] *Order* at n.29.

the time the majority finishes its analysis of the networks' reasons for not giving time,[1] the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority.

Under this decision presumably any one or more of the candidates could order all three networks to sell prime time at the same time on the same date. Unless affiliates refuse to carry the programs, almost all of our citizens would have no choice about what to watch if they want to watch TV. This certainly creates the appearance of government control over programming with all of the potential evils we have enunciated in numerous opinions. On the other hand, if the candidate really only wants one network in spite of the obligation we have placed on all networks, how is this choice made? "Lucky Louie" will take a beating in the ratings to the enrichment of the other two, or we (the State) will have to make the choice. Traditionally the licensee makes a decision within our rules to carry a political broadcast. Here, the State makes the decision that triggers other responsibilities under Section 315 of the Act.

It has been my experience that, when a case is this close, it is the better part of valor not to disturb the *status quo*. This decision turns it upside down on what, I believe, are questionable grounds.

I dissent.

DISSENTING STATEMENT OF
COMMISSIONER ABBOTT WASHBURN

Today's *Memorandum Opinion and Order* recites the litany: "We believe Section 312(a)(7) cannot, however, be implemented reasonably if either the interests of broad-

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[1] I found that these reasons thoughtfully included consideration of the needs of candidates, the public, and the networks.

casters or candidates are allowed to become preeminent." But having stressed the importance of this "delicate balance" between the two interests, the item goes on to establish a heavily weighted balance in favor of the needs of the candidates. Broadcasters are admonished to "honor as much as possible the candidate's decisions about his own media strategy". (See page 19, paragraph 50.) This new approach is inconsistent with the Commission's 1978 *Report and Order*, which set out the candidate's needs as only one of several factors to be considered, not *the* uppermost factor. Elevating the importance of candidate's needs also destroys the delicate balance between assuring broadcasters' independence of journalistic discretion, affording increased opportunities for political discussion by candidates, and informing the electorate.

In addition, the document adopted by the majority today goes far beyond the proper limits of Commission responsibility in political broadcasting matters. In detail (see pages 12-13, paragraphs 31-35) it substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such governmental intrusion is unwarranted, is illegal and, I fear, will have far-reaching consequences that will come back to haunt the Commission and the public again and again.

I dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-2403

[Filed May 15, 1980]

CBS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents

And Consolidated Case Nos. 79-2406 and 79-2407

Before: Bazelon, Senior Circuit Judge; Tamm, Circuit Judge; and Markey *, Chief Judge, United States Court of Customs and Patent Appeals

ORDER

Upon consideration of the petitions for rehearing filed herein by the National Association of Broadcasters, the American Broadcasting Companies, Inc., and the National Broadcasting Company, Inc., it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. 293(a).

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-2403

[Filed May 15, 1980]

CBS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents

And Consolidated Case Nos. 79-2406 and 79-2407

Before: Wright, Chief Judge; Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestions for rehearing *en banc* filed by the National Association of Broadcasters, the American Broadcasting Companies, Inc., and the National Broadcasting Company, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforementioned suggestions for rehearing *en banc* are denied,

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-1023

CBS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 11, 1980.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 4 day of June, 1980.

APPENDIX G

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 312(a)(7) of the Communications Act, as amended, 47 U.S.C. § 312(a)(7), provides:

"§ 312. *Administrative Sanctions—Revocation of Station License or Construction Permit*

(a) The Commission may revoke any station license or construction permit—

. . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Section 315 of the Act, 47 U.S.C. § 315, provides:

"§ 315. *Candidates for public office.*

(a) *Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities*

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have

no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) *Broadcast media rates*

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary run-off election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof."